IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EUGENE BATCHELDER, et al., Plaintiffs, v. JAMES M. GEARY, et al., Defendants.	No. C-71-2017 RMW ORDER ON MOTIONS TO TERMINATE CONSENT DECREES **[Re Docket Nos. 231, 324, 337, 338, 339, 348, 349, 350, 352, 353]**

In 1973, this court approved two consent decrees between Santa Clara County ("County") and inmates in its jails. The first required the County to establish a law library for inmates ("Access to the Courts Decree"). The second required the County to create a written code of rules and procedures to govern the imposition of in-jail disciplinary offenses ("Amended Disciplinary Procedures Decree").[1] On November 3, 2004 the County moved to terminate both Decrees under the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626 *et seq*. Kevin Hopkins ("Hopkins"), Barth Capela ("Capela"), Charles Lyons ("Lyons"), Ricky Reyes ("Reyes"), Theotis Golden ("Golden"), Timothy Walker ("Walker"), and Shawn Bautista ("Bautista") (collectively "prisoners")—who purport to represent a class of *pro per* inmates

[1] On September 16, 2004 the court issued an order to show cause why the County was not in contempt of the Decrees. The court held a hearing on November 19, 2004. On September 30, 2005 the court issued an order finding the County in contempt but declining to determine a remedy until after ruling on the County's motion to terminate the Decrees.

in the County's jails—oppose the motion and urge the court to modify, rather than terminate, the Decrees. At the pre-hearing conference on September 27, 2005 the parties agreed that an evidentiary hearing in connection with the motion was not necessary and the matter could be decided based upon declarations. Oral argument took place on November 4, 2005. The court has read the moving and responding papers and considered the arguments of counsel. For the reasons set forth below, the court (1) terminates the Access to the Courts Decree and (2) terminates the Amended Disciplinary Procedures Decree except to the extent that it requires a written statement of decision in certain disciplinary matters and (3) orders the parties to meet and confer with respect to the County's compliance with the requirement for written statements of decision.

I. BACKGROUND

On April 13, 1973 Judge Peckham of this court issued a preliminary injunction against the County's jail system. Schmid Decl. Supp. Mot. Term. Consent Decree ("Schmid Decl.") Ex. A. Noting that inmates have a constitutional right to "adequate access to the courts," Judge Peckham required the parties to submit plans to facilitate this right. *Id*. at 2. Judge Peckham also noted that the Due Process Clause of the United States Constitution's Fourteenth Amendment entitled inmates who had been charged with disciplinary offenses to certain procedural guarantees, including (1) notice of the alleged infraction, (2) a hearing before an impartial tribunal, (3) clearly-stated prison rules, (4) the right to call and cross-examine witnesses, and (5) the right to some form of representation. *Id*. at 3-4. Judge Peckham approved a modified version of a disciplinary scheme that the County had proposed. *Id*. at 7.

The parties filed the Access to the Courts Decree, which Judge Peckham approved on June 20, 1973. Schmid Decl. Exs. B, C. After the United States Supreme Court decided *Wolff v. McDonell*, 418 U.S. 539 (1974), the parties submitted the Amended Disciplinary Procedures Decree. Schmid Decl. Ex. D. Judge Peckham approved the Amended Decree on August 30, 1977. Schmid Decl. Ex. E. The court briefly describes each Decree below.

A. The Access to the Courts Decree

The Access to the Courts Decree "consists of a combination of furnishing inmates . . . with law books and legal materials and . . . legal services." Schmid Decl. Ex. B at 1. The Decree requires the County to establish law libraries at the Main Jail in San Jose, the Men's Rehabilitation Center in Milpitas,

the Elmwood Men's Rehabilitation Center, and the Elmwood Women's Detention Facility. *Id*. at 1, 5. The Decree mandates that the Main Jail and Men's Rehabilitation Center libraries contain current versions of specific sources. *Id*. at 1-2. In addition, the Decree created a system whereby inmates could borrow books and material from the Santa Clara Law Library. *Id*. at 2-3.

B. The Amended Disciplinary Procedures Decree

The Amended Disciplinary Procedures Decree requires the County to provide inmates with a copy of the Uniform Procedures of Prisoner Conduct. Schmid Decl. Ex. D at 1, 2. The Decree provides that prisoners are entitled to a hearing before a Violation Review Board if they plead not guilty to a major rule violation. *Id*. at 2. Under the Decree, the officer who observes the violation must prepare a written report and forward it to his supervisor. *Id*. at 3. The supervisor must provide the prisoner with a copy of the violation and inform him of his rights (1) to a hearing, (2) to request aid in investigating and preparing his case, and (3) to request a lay advocate. *Id*. at 4-5. The hearing must occur no more than five days after the prisoner receives notice of the alleged violation and within ten days of the incident itself. *Id*. at 5-6. The Decree empowers prisoners to cross-examine witnesses and "to present relevant evidence on his . . . behalf at no expense to the County." *Id*. at 7. The Decree mandates that the Board "render its decision orally" at the end of the hearing and "thereafter . . . indicate in writing its decision and the facts" on which it relied. *Id*.

C. The LRA

In 1987, the Santa Clara County Department of Corrections ("DOC") began operating the County's jail system.[2] In 2003 the DOC closed the jail libraries. The DOC contracted with Legal Research Associates ("LRA") to serve inmates' legal research needs. Williams Reply Decl.Supp. Rep. Mot. Term. Consent Decrees ("Williams Reply Decl.") Ex. A. Richard Williams ("Williams"), an attorney licensed to practice in California, owns and operates LRA. Williams Reply Decl. ¶ 1.

Inmates first learn about LRA when they see a DOC orientation video upon entering jail. *Id*. at ¶ 13. Jail personnel inform new inmates that the facility does not contain a physical law library. Marti-Torres Decl. Supp. Rep. Mot. Term. Consent Decrees ("Marti-Torres Decl.") ¶ 4. To use LRA's services,

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[2] The DOC operates the Main Jail and the Elmwood facility. Marti-Torres Decl. Supp. Rep. Mot. Term. Consent Decrees ("Marti-Torres Decl.") ¶ 2. If an inmate at Elmwood receives *pro per* status, the DOC transfers him to the Main Jail. *Id*.

inmates complete request forms. Williams Reply Decl. at ¶ 6(a).[3] Twice each day, jail staff collect the forms, log them, and fax them to LRA's offices. *Id*. at ¶ 6(b). LRA receives the forms, logs them into an electronic database, and prioritizes requests by *pro per* inmates and other inmates with impending court dates. *Id*. at ¶ 6(c). LRA then shreds the faxed requests. *Id*. at ¶ 18. LRA collects responsive information and inserts it into unsealed envelopes. *Id*. at ¶ 6(d).[4] LRA sends the responses by overnight courier to the jails. *Id*. at ¶ 6(e). At some point, either officers or LRA employees log the date each inmate receives the response. *Id*. at ¶ 6(e). Officers also return the original research request to the inmate. *Id*. at ¶ 18. The contract between LRA and DOC requires LRA to respond to inmates within three working days of the request. *Id*. at ¶ 6(f). If LRA needs more time, it must contact the inmate and explain why. *Id*.

Williams, who also practices law, spends about 60% of his time working for LRA. *Id*. at ¶¶ 2, 7. The LRA staff consists of one certified paralegal, Curtis Denton, and four other employees, Shelley Howell, Shani Williams, Sharon Williams, and Jeffery Williams. *Id*. at ¶ 7. LRA uses Lexis-Nexis and Westlaw for legal research. *Id*. at ¶ 9.

Williams claims that he designed LRA to facilitate research on behalf of individuals who often lack formal legal training. According to Williams, inmates may request cases by portions of the case name, and LRA employees will search using alternative names if they are initially unable to find a case. *Id*. at ¶ 10. In addition, LRA has created approximately 500 information packets on subjects about which inmates frequently inquire. *Id*. at ¶ 11. Williams contends that the packets enable inmates to make research queries in plain English. *Id*. The packets generally contain statutes, selections from secondary sources, forms, and standard jury instructions. *Id*. For example, LRA offers packets on how to set aside an information under

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[3] Prisoners contend that Williams' explanation of how LRA operates is inadmissible because it (1) lacks foundation, (2) is improper lay witness testimony, and (3) violates Local Rule 7-5(b), which requires affidavits to "contain only facts . . . and avoid conclusions and argument"). These arguments lack merit. For one, Williams, who created LRA, has firsthand knowledge of how the system works. *See* Fed. R. Evid. 602 (witness' own testimony may establish that they "ha[ve] personal knowledge of the matter"). Second, Williams need not be qualified as an expert to describe LRA. *See* Fed. R. Evid. 701, 2000 amend. (lay testimony that stems from "particularized knowledge that the witness has by virtue of his or her position in the business" is proper if explained in terms most laypeople can understand). Finally, prisoners' objection under Local Rule 7-5(b) is inapplicable to this portion of Williams' declaration, which consists solely of facts.

[4] According to Williams, LRA does not seal envelopes to allow jail personnel to inspect their contents more easily. Williams Reply Decl.¶ 6(d).

California Penal Code section 995 or to suppress evidence under California Penal Code section 1538.5. *Id*. Some packets include sample motion forms, including points and authorities. *Id*.[5]

LRA gives inmates printouts from Westlaw's "citing references" function to Shepardize authorities. *Id*. at ¶ 15. It provides inmates with tables of contents and indices from some secondary sources but not others. *Id*. at ¶ 16. It does not provide inmates with a list of available packets. *Id*. LRA also exercises its discretion not to provide certain sources to inmates, such as *Law Review* articles, Restatements of the Law, or Continuing Education of the Bar publications. *Id*. at ¶ 17. It also refuses to provide unpublished cases or briefs in order "to avoid having an inmate rely upon authorities that cannot be used in support of requested relief." *Id*.

D. The County's Disciplinary Policy

The County has a written policy for Inmates Rules and Discipline. Fischer Decl. Supp. Rep. Mot. Term. Consent Decrees ("Fischer Decl.") Ex. A.[6] Jail personnel provide inmates with an Inmate Orientation and Rule Book when they enter the facility. *Id*. at ¶ 2, Ex. B. Rule Books are available in both English and Spanish. *Id*. at ¶ 2. The County posts copies of the Rules and Penalties conspicuously in all general population housing. *Id*. The Rule Books set forth the disciplinary procedure for criminal, major, and minor rule violations. *Id*.

When an officer observes an inmate violating a major rule, he must draft a written infraction report within twenty-four hours. *Id*. at ¶ 5. The officer must give the inmate a copy of this report. *Id*. The officer then forwards the report to a sergeant, who investigates the matter. *Id*. The sergeant informs the inmate that he is entitled to a hearing if he denies committing the violation and may have the assistance of a

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[5] Prisoners contend that Williams' description of the packets violates the best evidence rule. Federal Rule of Evidence 1002 provides that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required . . . ." Even assuming that prisoners are correct that Williams asserts what the packets contain and thus seeks to prove their contents, prisoners do *not* contend that Williams' description is inaccurate. The best evidence rule only applies "when the terms of the writing *are in dispute*." *Seiler v. Lucasfilm, Ltd.*, 808 F.2d 1316, 1319 (9th Cir. 1986) (emphasis added). The court thus overrules prisoners' objection.

[6] Prisoners move to strike Fischer's testimony on the grounds that the County did not present Fischer as its Federal Rule of Civil Procedure 30(b)(6) person most knowledgeable with respect to disciplinary procedures. The court denies the motion. Fischer's declaration consists almost entirely of background facts; exactly what prisoners seek to accomplish with this motion is unclear.

representative if he desires. *Id*. at ¶ 6. Friends Outside, a group that assists inmates, may interview witnesses and prepare the inmate for the hearing. *Id*. at ¶ 8. The hearing must occur within ten judicial days but no sooner than twenty-four hours after the inmate receives a copy of the infraction. *Id*. at ¶ 9.

Inmates may present documentary evidence and call witnesses at the hearing. *Id*. at ¶ 10. However, the County sometimes does not permit certain witnesses to appear because of safety concerns. *Id*. For example, witnesses classified as "double red" have previously assaulted other inmates or staff and thus may not be entitled to call witnesses. *Id*. Inmates may not cross-examine witnesses. *Id*. An administrative lieutenant oversees the hearing. *Id*. at ¶ 11. After the hearing, the panel provides a written statement. *Id*. at ¶ 13. The statement lists (1) the officer who observed the infraction, (2) the inmates involved, (3) the date the hearing was held, (4) a description of the incident, (5) the hearing lieutenant and panel members, and (6) the panel's factual findings and conclusions. *Id*. The panel informs the inmate that he may appeal the decision to the Division Commander, who must affirm or reverse within five days. *Id*.

E. The Prisoners

1. Hopkins

The County incarcerated Hopkins in the Main Jail from December 3, 2003 to April 22, 2005. Hopkins Decl. Supp. Opp. Mot. Term. Consent Decrees ("Hopkins Decl.") ¶ 2; Schmid Decl. Supp. Rep. Mot. Term. Consent Decrees ("Schmid Reply Decl.") ¶ 20(a)(i).[7] Hopkins represented himself in his criminal case in California Superior Court from December 11, 2003 until August 18, 2004. Hopkins Decl. ¶ 3. When Hopkins decided to proceed *pro per*, he "did so under the assumption that [he] would have access to a physical law library." *Id*. at ¶ 4. After the court approved Hopkins' *pro per* status, the County provided him with legal tablets, subpoenas, pencils, a sample discovery motion, and criminal procedure rules. Schmid Reply Decl. at ¶ 20(a)(ii). The County also allowed Hopkins to spend about ten hours per week in a word processor room. *Id*. Ultimately, LRA provided Hopkins with about 3,800 pages of

[7] Prisoners correctly note that Schmid's declaration improperly contains legal argument, thus violating Local Rule 7-5. However, both parties have taken liberties with this rule: prisoners' opposition brief contains dozens of pages of similar legal argument in two appendices. The court believes the best course is to consider both Schmid's declaration and prisoners' appendices.

research material, including 104 criminal packets, forty-five statutes, twenty-six cases, one civil packet, and four forms. Williams Reply Decl. ¶ 19.[8]

Hopkins filed thirty-two criminal trial court motions, two habeas corpus petitions, and two appellate court writs contesting trial court rulings. Hopkins Decl. ¶ 6(a)-(y); Schmid Rep. Decl. ¶ 20(b)(c). The court granted approximately thirteen of Hopkins' criminal trial court motions. Hopkins Decl. ¶ 6(a)-(y). Hopkins claims that LRA is inadequate because it took an average of five to ten days to receive materials in response to his research requests. *Id*. at ¶ 9. In addition, Hopkins asserts that LRA sometimes ignored his requests or responded that he needed to be "more specific." *Id*. at ¶¶ 10-11. Hopkins contends that he was not aware that LRA could Shepherdize cases or provide him with expedited responses during trial. *Id*. at ¶¶ 13-14. Hopkins claims that officers left LRA's responses "between the bars of the communal cell in which [he] was housed, exposing them to any of the dozen or so inmates in that cell." *Id*. at ¶ 15.

According to Hopkins, LRA's inadequacies prevented him from succeeding on five motions: (1) a motion seeking to release documents produced pursuant to a subpoena *deuces tecum*, (2) a motion to dismiss the prosecution against him under the *ex post facto* clause, (3) a motion to compel a witness to appear for cross-examination during his preliminary examination, (4) a motion for access to the courts, and (5) a request for a hernia operation. *Id*. at ¶¶ 6(d), 17(a)-(d). Hopkins claims that LRA's failures caused him to withdraw from *pro per* status. Hopkins Decl. ¶ 19.

2. Capela

Capela entered County custody in August 2003. Capela Depo. at 9:20-10:1. The County appointed a public defender to represent him. *Id*. at 16:3-10. Capela requested *pro per* status on November 19, 2003. *Id*. at 19:18-23:4; Capela Decl. Supp. Mot. Term. Consent Decrees ("Capela Decl.") ¶¶ 2-4. He represented himself in his criminal case until April 2004. *Id*. at ¶ 4. After the court granted his request, the County transferred him from Elmwood to the Main Jail. *Id*. at ¶ 5. The County provided him with three legal pads, pencils, subpoena forms, and written information about his rights. Capela Depo. at 33:18-34:5. Capela asserts that he made the decision to represent himself because he

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[8] The prisoners contend that Williams' summary of what LRA provided Hopkins and other inmates is inadmissible because it violates the best evidence rule. Not so. The best evidence rule requires a party to introduce an original document to prove its contents. *See* Fed. R. Evid. 1002. Williams offers the summary not to prove anything specific about a particular document, but the fact that Hopkins received a certain number of documents.

believed that he would have access to a physical law library. Capela Decl. ¶ 6. He submitted eighteen requests to LRA. Williams Reply Decl. ¶ 19. LRA responded with 827 pages of material. *Id*.

Capela's criminal trial began on March 31, 2004. Capela Decl. at ¶ 12. Capela claims that LRA prevented him from effectively researching jury instructions or how to subpoena a key defense witness. *Id*. at ¶¶ 13-16. In addition, he contends that LRA prevented him from successfully challenging a robbery charge which the district attorney improperly added after the preliminary hearing. *Id*. at ¶ 9. Overall, he filed thirteen motions and succeeded on one. *Id*. at ¶ 11(a)-(g). Capela alleges that his family hired an attorney to represent him in post-conviction matters because they realized that continued *pro per* representation would be futile. *Id*. at ¶ 17.

3. Lyons

A public defender represented Lyons from January to April 2004. Lyons Decl. Supp. Mot. Term. Consent Decrees ("Lyons Decl.") ¶ 3. From April to July 2004, Lyons represented himself. *Id*. at ¶ 4. Lyons claims that LRA responded to his requests in three to eight days. *Id*. at ¶ 6. He argues that this was problematic because he generally only received one week's notice of hearings in his case. *Id*. According to Lyons, LRA once replied so close to the filing deadline that he could not file a motion to strike an improper charge in time. *Id*. at ¶ 11. In addition, he contends that a court once rejected a sample *Pitchess* motion[9] that he had obtained from LRA as "incomplete." *Id*. at ¶ 10. Finally, he asserts that LRA enclosed its responses in unsealed envelopes, and often left them "out in the open." *Id*. at ¶ 7. Overall, he submitted thirty research requests and received 1,055 pages of material. Williams Reply Decl. ¶ 19. He filed approximately fourteen motions and succeeded on two. Lyons Decl. at ¶ 13(a)-(j). He asserts that he withdrew from *pro per* status in July 2004 because he realized that he could not properly defend himself. He contends that he then retained an attorney who entered a guilty plea against his wishes. *Id*. at ¶ 14.

4. Reyes

Reyes faced two drug-related charges and one charge of failure to register with a law enforcement agency. Reyes Depo. at 6:14-7:4. A public defender represented Reyes from September 2003 to

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[9] A *Pitchess* motion is a request that the court "screen[] law enforcement personnel files *in camera* for evidence that may be relevant to a criminal defendant's defense." *People v. Mooc*, 26 Cal. 4th 1216, 1225 (2001).

December 2003. Reyes Decl. Supp. Mot. Term. Consent Decrees ("Reyes Decl.") ¶ 3. From December 2003 to May 2004, he represented himself in two criminal cases. *Id*. at ¶ 4. From February to May 2004, he represented himself in a third criminal case. *Id*. He claims that he decided to proceed *pro per* because he believed that he would have access to a physical law library. *Id*. at ¶ 5.

According to Reyes, "[u]sing LRA was difficult" because its response times ranged from a week to ten days. *Id*. at ¶ 8. In addition, Reyes asserts that, about five to seven times, LRA simply did not respond to requests. *Id*. at ¶ 9. Reyes states that the fact he faced multiple charges made using LRA more difficult. For example, he claims that LRA only permitted him to make three requests at a time. *Id*. at ¶ 19. He contends that it took six months to receive all of the California Penal Code sections with which he had been charged. *Id*.

Reyes asserts that LRA was responsible for his inability to obtain information about police reports and discovery. In addition, he claims that LRA hindered his ability to file (1) a motion to suppress evidence under California Penal Code section 1538.5, (2) a *Pitchess* motion, (3) a motion to hold a witness in contempt, (4) a motion for a continuance, (5) a motion to strike prior felony convictions, under California Penal Code section 1385, and (6) a motion to be released on his own recognizance. *Id*. at ¶¶ 10, 17, 21, 22. He submitted twenty-nine requests to LRA and received 1,501 pages of material. Williams Reply Decl. ¶ 19. He filed approximately twelve motions and succeeded on three. *Id*. at ¶ 13(a)-(j). He ultimately withdrew from *pro per* status and pled guilty to all of the counts against him. Reyes Decl. ¶¶ 28-29.

5. Golden

The County incarcerated Golden in the Main Jail from April 2004 to May 2005. Golden Decl. Supp. Opp. Mot. Term. Consent Decrees ("Golden Decl.") ¶ 2. Golden represented himself in a civil rights lawsuit against a parole officer for alleged false imprisonment in March 2004. *Id*. at ¶ 3. He also represented himself in his pending criminal case beginning in December 2004. *Id*. at ¶ 4. Golden's criminal trial began on January 19, 2005 and ended on January 27, 2005. RJN Ex. BBB.[10] He claims that he was not aware that LRA would expedite research requests during trial. *Id*. at ¶ 9. As a result, he asserts, he

[10] The minutes from the trial erroneously state the date as "2004." *See* RJN Ex. BBB.

was not able to contest the district attorney's hearsay objection to a "critically, potentially exculpatory" report authored by an investigator. *Id*. at ¶ 9(a)-(b). He contends that he received "no response whatsoever" from LRA "[o]n at least three occasions." *Id*. at ¶ 10. According to Golden, LRA frequently refused to provide him with sources he needed, such as (1) a section from the Model Penal Code, (2) an article in the *Harvard Law Review*, (3) petitions for *certiorari*, (4) citing references to an unpublished case, and an excerpt from *California Criminal Defense Practice*. Golden Decl. ¶¶ 15-22. Overall, he filed approximately sixteen motions in his criminal case and succeeded on two. *Id*. at ¶ 14(a)-(o). He submitted 236 research requests to LRA and received 7,469 pages of material, including 356 cases, 368 statutes, 346 criminal packets, ten civil packets, twenty forms, and thirty-four memos. *Id*.

On January 21, 2005 Golden received an infraction for failing to wear his identification wristband and being disrespectful to an officer. Golden Decl. Ex. 22. He appealed. Golden Decl. Ex. 23. Golden claims that he did not know that he engaged in prohibited conduct because he never received a Rule Book. Golden Decl. ¶ 39. According to Golden, he met with Jose Hernandez ("Hernandez") from Friends Outside on the day of the hearing. *Id*. at ¶ 40. Golden asserts that he did not know that he was entitled to call witnesses until Hernandez told him. *Id*. at ¶¶ 41(a)-(b). Golden contends that he could have called witnesses who would have contradicted the officer's version of the events. *Id*. at ¶¶ 41(c)-(d). He alleges that Hernandez did not tell him that he could obtain a continuance to find these witnesses. *Id*. at ¶ 41(h). He also claims that the panel did not inform him of his rights to (1) call witnesses, (2) continue the hearing, (3) avoid self-incrimination, (4) cross-examine witnesses, and (5) present argument. *Id*. at ¶¶ 42(a)(i)-(v). The panel found Golden guilty and sentenced him to three days of disciplinary lockdown. Golden Decl. Ex. 22. He asserts that he never received a written rationale for the panel's decision. Golden Decl. ¶ 45.

6. Walker

Walker has "been in and out of the Mail Jail" since 1982. Walker Decl. Supp. Opp. Mot. Term. Consent Decrees ("Walker Decl.") ¶ 2. Walker claims that he used the Main Jail's law library to file eight civil rights lawsuits between 1991 and 1993. *Id*. at ¶¶ 3-4. According to Walker, the law library was open "24 hours a day, 7 days a week." *Id*. at ¶ 7. Walker asserts that prison authorities permitted him to use the library for two hours each day and "for up to six hours" every other day. *Id*. He claims that access to materials in hard copy was important because they contained indices and tables of contents, and "[a]s an

inmate with no legal training, [he] simply would not know what cases or statutes to turn to without the aid" of such resources." *Id*. at ¶ 9. He estimates that a pleading that would have taken him one to two weeks to prepare using a law library takes about six months using LRA. *Id*. at ¶ 14. He also asserts that he finds LRA's disclaimers of the attorney-client relationship confusing. *Id*. He has submitted eighty-eight requests to LRA and received 4,561 pages of research materials, including eighty-six cases, 151 statutes, ninety-one criminal packets, twelve civil packets, ten forms, and seventeen memos. Williams Reply Decl. Ex. I.

Walker claims that he received an infraction for allowing another inmate use his pin number for *pro per* telephone calls. Walker Decl. ¶ 33. He contends that the DOC notified him of the infraction by letter. *Id*. at ¶ 33(a). He asserts that he met with the sergeant, who asked him how he wanted to plead. *Id*. at ¶ 33(b). According to Walker, at the time of this meeting, he did not know whether he had the right to present evidence at the hearing. *Id*. at ¶ 33(c). He also contends that prison staff once failed to provide him with access to his lay advocate within twenty four hours of the hearing, which forced the panel "to negate its guilty findings." *Id*. at ¶ 34. He alleges that the County did not allow him to present witnesses at his infraction hearings "[o]n numerous occasions." *Id*. at ¶ 35.

Walker also contends that the County failed to provide him with a complete copy of another infraction report dated January 17, 2005. *Id*. at ¶ 36. In addition, he asserts that the County failed to provide him with twenty-four hours notice of his hearing. *Id*. Walker appealed his infraction, noting these alleged problems. Walker Decl. Ex. H.

7. Bautista

Bautista has been an inmate in the Main Jail since June 17, 2004. Bautista Decl. Supp. Opp. Mot. Term. Consent Decrees ("Bautista Decl.") ¶ 2. He was also in DOC custody from August 2004 to January 2005 and April 2002 to January 2003. *Id*. at ¶ 3. He is currently representing himself in a criminal case and two civil rights cases. *Id* at ¶¶ 4, 7.

Bautista submitted 256 research requests and received 19,599 responsive pages. Williams Reply Decl. ¶ 19. He filed over thirty motions in his criminal case and at least partially succeeded on about eight. *Id*. at ¶¶ 6(a)-(x). In addition, he filed four motions in his civil rights cases and succeeded on three. *Id*. at ¶¶ 8(a)-(c). He claims that LRA responds in an average of seven days. *Id*. at ¶ 15. According to Bautista, LRA often takes longer to respond. When this occurs, he receives a "seven day" memo,

indicating that LRA needs more time. *Id*. at ¶ 16. He also claims that LRA routinely fails to provide specific secondary sources and misinterprets his requests. *Id*. at ¶¶ 21(a)-(z), 22-23, 26-30.

Bautista contends that he received an infraction in 2004 for having an illegal radio in his cell. *Id*. at ¶ 33. According to Bautista, he met with Hernandez "for two minutes" before the hearing. *Id*. at ¶ 35. Bautista claims that the panel did not advise him of (1) the burden of proof, (2) his right against self-incrimination, (3) or his right to call witnesses or get a continuation. *Id*. at ¶ 37. He alleges that he was found guilty, but successfully appealed because the panel denied him "access to critical documents," witnesses, and twenty-four hours' notice of the hearing. *Id*. at ¶¶ 41-42.

II. ANALYSIS

A. The PLRA

The PLRA requires a court to terminate a consent decree unless it remains necessary to prevent violations of prisoners' constitutional rights:

> (2) Immediate termination of prospective relief. In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.
> (3) Limitation. Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

18 U.S.C. § 3626(b)(2) & (b)(3) ("the termination provisions").

In *Gilmore v. People of the State of California*, 220 F.3d 987 (9th Cir. 2000), the Ninth Circuit held that the termination provisions were constitutional if construed narrowly. Prisoners appealed orders terminating consent decrees in two cases: *Gilmore* and *Thompson*. First, the prisoners contended that the termination provisions violated the separation of powers doctrine. Because consent decrees are not just settlement contracts, but final judgments entered by Article III courts, the prisoners argued that Congress lacks the power to void them. The court avoided this "grave constitutional question" by focusing on the statute's definition of the term "consent decree." *Id*. at 1000-01. The court noted that the statute defined consent decree "exclusively in terms of the relief it provides; specifically, the statute states that "'consent decree" means any *relief* entered by the court that is based on whole or in part upon the consent . . . of the

parties.'" *Id*. at 1001 (quoting 18 U.S.C. § 3626(g)(1)) (emphasis supplied by *Gilmore*). The court noted that while Congress cannot require an Article III court to set aside a final judgment, Congress "may set a new and retroactively applicable standard for obtaining relief from final judgments which impose forward-looking injunctive remedies." *Id*. at 1001. Thus, the court determined that the termination provisions "simply amend[ ] Rule 60(b)—the rule that otherwise governs courts' power to modify or terminate relief granted pursuant to a final judgment." *Id*. at 1003.[11] Under this "saving construction," the court explained, the termination provisions mandate that courts preserve any portion of a consent decree that remains "necessary to correct a current and ongoing violation of a federal right, so long as that relief is limited to enforcing the constitutional minimum." *Id*. at 1000.

The court then rejected the prisoners' argument that the termination provisions unconstitutionally prescribed a rule of decision[12] by "unconditionally direct[ing] federal courts to terminate prospective relief in prison condition cases decided prior to the [PLRA]." *Id*. at 1004-05. "[I]dentifying the degree to which the termination provisions deviate from the general standards for granting and modifying continuing decrees" reveals that they leave "room for adjudication" and "the exercise of traditional equity powers." *Id*. at 1005. The court noted that, in general, courts may only craft equitable remedies that "heel close to the identified violation." *Id*. However, consent decrees, "precisely because of their consensual nature, [may] provide more than the constitutional minimum." *Id*. The court concluded that the termination provisions did not prescribe a rule of decision because they merely required courts to strike any part of a consent decree that imposed obligations that the court could not have properly ordered on its own. *Id*. at 1006.

The court then examined whether the termination provisions prescribed a rule of decision with respect to the modification of prospective relief. Under existing law, the party seeking to alter a consent

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[11] Rule 60(b) enables courts to "relieve a party . . . from a final judgment" if, *inter alia*, "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or [for] any other reason justifying relief from the operation of the judgment."

[12] The phrase "rule of decision" refers to a congressional attempt to alter the precise results of a pending case: to forbid a court "to give the effect to evidence, which in its own judgment, such evidence should have" and direct a contrary result. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 136-47 (1871).

decree bears the burden of proving that circumstances have changed. *Id*. at 1007. The court drew several conclusions about the termination provisions:

> First, nothing in the termination provisions can be said to shift the burden of proof from the party seeking to terminate the prospective relief. Second, . . . a district court cannot terminate prospective relief without determining whether the existing relief (in whole or in part) exceeds the constitutional minimum. And, consistent with § 3626(b)(3), a district court cannot terminate or refuse to grant prospective relief necessary to correct a current and ongoing violation, so long as the relief is tailored to the constitutional minimum . . . . If the existing relief qualifies for termination under § 3626(b)(2), but there is a current and ongoing violation, the district court will have to modify the relief to meet the Act's standards.

Id. at 1007-08. The court held that the termination provisions, read in that manner, "require real adjudication—the careful application of law to fact—not the wooden ratification of a legislatively prescribed conclusion," and were constitutional. *Id*. at 1008. However, the court refused to follow the statute's instruction to invalidate consent decrees that did not include findings that the relief was as narrow and unintrusive as possible. *Id*. at 1007 n.25. The court reasoned that because the law at the time of the consent decree did not require such findings, "relief which was in fact narrowly tailored would be subject to termination," and thus the statute would prescribe a rule of decision. *Id*. According to the court, the proper course was to inquire whether "the record, the court's decision ordering prospective relief, and relevant case law fairly disclose that the relief actually meets the § 3626(b)(2) narrow tailoring standard." *Id*.

Finally, the court applied the statute to *Gilmore* and *Thompson* and concluded that both courts erred by terminating the consent decrees. The court held that *Gilmore* improperly placed the onus on the prisoners to establish that the consent decree (1) did not "exceed[ ] the constitutional minimum" and (2) was necessary to correct "a current and ongoing violation of Federal right." *Id*. at 1008. The court also explained that *Gilmore* incorrectly terminated the consent decree based solely on the fact that it did not contain specific findings as to the narrowness of its remedy. *Id*. Instead, the district court should have "examine[d] the court record and relief granted by the [consent decree] to determine whether it was narrowly tailored and minimally intrusive." *Id*. Similarly, the district court in *Thompson* erred by (1) relying on the consent decree's lack of specific findings to hold that the decree was terminable and (2) not permitting the prisoners to offer evidence about current constitutional violations. *Id*. at 1009-10. The court reversed both decisions and remanded the cases for further proceedings.

1. The Burden of Proof Under § 3626(b)(2) and § 3626(b)(3)

Under *Gilmore*, the County has the burden of proving that (1) the Access to the Courts Decree and the Amended Disciplinary Procedures Decree are terminable under § 3626(b)(2) because they exceed the constitutional minimum and (2) current prison conditions do not constitute a current and ongoing constitutional violation under § 3626(b)(3). *See Gilmore*, 220 F.3d at 1009. However, the County cites *Hallett v. Morgan*, 296 F.3d 732 (9th Cir. 2002) and *Guajardo v. Texas Dept. of Criminal Justice*, 363 F.3d 392 (5th Cir. 2004) (per curiam) for the proposition that "if a prisoner class seeks . . . prospective relief under [§] 3626(b)(3), the burden is on the prisoners." Rep. Mot. Term. Consent Decrees at 3:1-13. The court disagrees.

In *Hallett*, a district court entered a consent decree relating to a prison's health care policies. The decree provided that the court's jurisdiction would expire in January 1999. However, the decree also allowed the prisoners to apply to extend the court's jurisdiction. As January 1999 approached, the prisoners filed such a motion. The court determined that the prisoners would have to satisfy the PLRA to succeed. That same day, defendants filed a motion under § 3626 seeking to terminate the decree. After an evidentiary hearing, the court denied the prisoners' motion and granted defendants' motion. The Ninth Circuit affirmed. The court rejected the prisoners' argument that "the district court erred by requiring them to prove a 'current and ongoing violation' of their constitutional rights." *Hallett*, 296 F.3d at 743. Yet, contrary to the County's argument, the court did not do so on the ground that the prisoners had failed to meet their "burden" under the *termination provisions*. Instead, the court held that the prisoners had failed to meet their burden under § 3626(a)(1)(A): the provision that restricts the power of federal courts to grant prospective relief in the first instance. The court expressly declined to rule on whether the district court correctly granted defendants' motion to terminate the decree. *See id*. at 749 ("we need not examine whether the district court erred in its analysis of [d]efendants' motion to terminate" because "[t]he [j]udgment expired by its own terms when the district court denied [p]laintiffs' motion to extend").

In *Guajardo*, the Fifth Circuit held that a district court correctly required prisoners "to demonstrate ongoing violations and that the relief is narrowly drawn" under § 3626(b)(3). *Guajardo*, 363 F.3d at 395. In the court's view, *Hallett*'s "reasoning—placing the burden of proof under [§] 3626(b)(3) on the party opposing termination of a consent decree—is in obvious tension with the earlier reasoning in *Gilmore*." *Id*.

The court determined that "a plain reading of the PLRA, including its structure" indicated that prisoners bore the burden under § 3626(b)(3). *Id*. at 396.

The court has serious doubts about *Gilmore*'s conclusion that defendants must prove "compliance" with prisoners' constitutional rights under § 3626(b)(3). *See Gilmore*, 220 F.3d at 1009.[13] *Gilmore* began with the premise that, under Rule 60(b), the party seeking relief from a final judgment must establish '"a significant change either in factual conditions or in law."' *Id*. at 1007 (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 377 (1992)). *Gilmore* then reasoned that "nothing in the termination provisions can be said to shift the burden of proof from the party seeking to terminate the prospective relief." *Id*. *Gilmore* may be correct that § 3626(b)(2) tracks Rule 60(b) by requiring defendants to prove that relief is subject to termination because it was not narrowly tailored at its inception. But common sense suggests that defendants should not have to prove a negative—the absence of a "current and ongoing" constitutional violation—under § 3626(b)(3).[14] Moreover, if *Gilmore* is correct that (1) "[t]he general standard for granting prospective relief differs little from the standard set forth in § 3626(b)(2) . . . [and] § 3626(b)(3)" and (2) defendants bear the burden of proof under § 3626(b)(2) and§ 3626(b)(3), then (3) it would logically follow that defendants also bear the burden when a plaintiff asks a court to "grant[ ] prospective relief" under 18 U.S.C. § 3626(a)(1)(A). That would be bizarre: of course, plaintiffs normally bear the burden of proof when they seek an injunction. Finally, even if Rule 60(b) places the burden on the party seeking relief from a consent decree, it is unclear why *Gilmore* did not consider whether the PLRA altered this rule. As *Gilmore* itself realized, "the PLRA . . . amends Rule 60(b)"and "creates a more exacting standard for federal courts to follow." *Gilmore*, 220 F.3d at 1003, 1007.

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[13] Matters might be different if *Gilmore*'s holding with respect to the burden of proof flowed from constitutional considerations. However, *Gilmore* expressly relied on the statute itself to reach this conclusion. *See Gilmore*, 220 F.3d at 1007 ("nothing *in the termination provisions* can be said to shift the burden of proof from the party seeking to terminate the prospective relief") (emphasis added). As *Guajardo* suggests, this is questionable.

[14] Indeed, "the great majority of courts to address th[e] issue" have assigned the burden under § 3626(b)(3) to the prisoners. *Guajardo*, 363 F.3d at 395-96; *Ruiz v. Johnson*, 154 F. Supp. 2d 975, 984 n.12 (S.D. Tex. 2001) ("the burden of showing extant constitutional violations . . . fall[s] on the prisoners"); *Laaman v. Warden, New Hampshire State Prison*, 238 F.3d 14, 19 (1st Cir. 2001) (holding that prisoners bear burden of showing that "current and ongoing" constitutional violations "persist"); *Imprisoned Citizens Union v. Shapp*, 11 F. Supp. 2d 586, 604 (E.D. Pa. 1998) ("the burden imposed by the PLRA [is] that inmates prove a 'current and ongoing violation' of a federal right").

Nevertheless, this court is bound to follow *Gilmore*. "If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect." *Hart v. Massanari*, 266 F.3d 1155, 1169-70 (9th Cir.2001). As noted above, *Hallett* held only that the prisoners failed to "establish that the prospective relief 'extend[s] no further than necessary to correct the violation of' their [constitutional] rights" under § 3626(a)(1)(A). *Hallett*, 296 F.3d at 743 (quoting 18 U.S.C. § 3626(a)(1)(A)). *Hallett*'s discussion of the burden of proof under § 3626(b)(3) is *dicta.* Despite the fact that several out-of-circuit courts have disagreed with *Gilmore*, "[d]istrict courts are, of course, bound by the law of their own circuit, and 'are not to resolve splits between circuits no matter how egregiously in error they may feel their own circuit to be.'" *Zuniga v. United Can Co.*, 812 F.2d 443, 450 (9th Cir. 1987) (quoting *Hasbrouck v. Texaco, Inc.*, 663 F.2d 930, 933 (9th Cir. 1981)). The court thus holds that the County must prove that it is complying with prisoners' constitutional rights under § 3626(b)(3).

B. The Access to the Courts Decree

1. Post-Conviction Prisoners' Rights of Access to the Courts

In *Bounds v. Smith*, 430 U.S. 817, 821-22 (1977), the United States Supreme Court held that prisoners have a constitutional right to "adequate, effective, and meaningful" access to the courts.[15] The Court commented that "[i]t would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief available." *Id*. at 825. The Court explained that the right of access to the courts safeguarded prisoners' ability to appeal their convictions and seek redress for civil rights violations. *Id*. at 827. Refusing to adopt an inflexible standard, the Court reiterated that prisons could fulfill prisoners' right of access in myriad ways. *Id*. at 830-31.

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[15] The Court did not explain which constitutional provision gave rise to this right. *See, e.g.*, *Bounds*, 430 U.S. at 839 (Rehnquist, J., dissenting) ("[T]he Court's opinion today . . . proceeds instead to enunciate a 'fundamental constitutional right of access to the courts,' . . . which is found nowhere in the Constitution."). However, subsequent cases have generally described the right as rooted in the Fifth Amendment's Due Process Clause. *See, e.g., Storseth v. Spellman*, 654 F.2d 1349, 1352 (9th Cir. 1981) ("It is well established that inmates have a constitutional right of access to the court. That right is premised on the Due Process Clause . . . .").

Several years later, in *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986), the Ninth Circuit held that a "paging" legal research system was unconstitutional under *Bounds*. The system excluded high-risk inmates from the law library and forced them to request books to be delivered to their cells. The Ninth Circuit held that the system was constitutional only if supplemented with hands-on legal research assistance:

> 'Ordinarily, a prisoner should have direct access to a law library if the state chooses to provide a prison law library as its way of satisfying the mandate of *Bounds*. Simply providing a prisoner with books in his cell, if he requests them, gives the prisoner no meaningful chance to explore the legal remedies that he might have. Legal research often requires browsing through various materials in search of inspiration; tentative theories may have to be abandoned in the course of research in the face of unfamiliar adverse precedent. New theories may occur as a result of a chance discovery of an obscure or forgotten case.'

Id. at 1109-10 (quoting *Williams v. Leeke*, 584 F.2d 1336, 1339 (4th Cir. 1978)).

However, *Lewis v. Casey*, 518 U.S. 343 (1996) limited *Bounds* and appeared to overrule *Toussaint*. *Lewis* involved a class action challenging the adequacy of the Arizona Department of Corrections ("ADOC")'s law libraries. The district court entered a broad injunction that "specified in minute detail the times that libraries were to be kept open, the number of hours of library use to which each inmate was entitled . . ., the minimal educational requirements for prison librarians . . ., [and] the content of a videotaped legal-research course for inmates . . . ." *Id*. at 347. The Ninth Circuit affirmed, but the Supreme Court reversed. The Court first noted that, under standing principles, an inmate must show "actual injury" to prevail on access to the courts claim. The Court explained that because "*Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense." *Id*. at 351. The Court also noted that an inmate cannot show "actual injury" by proving that the prison's legal research system frustrated his attempt "to *discover* grievances, [or] to *litigate effectively* once in court," as "[i]mpairment of [such] litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Id*. at 354-55 (emphasis in original). Instead, the Court held, an inmate must prove that the prison's facilities frustrated his ability to file a nonfrivolous criminal appeal, habeas corpus petition, or civil rights claim challenging the conditions of his confinement:

> He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable

> harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint . . . . Finally, we must observe that the injury requirement is not satisfied by just any type of frustrated legal claim. Nearly all of the access-to-courts cases in the *Bounds* line involved attempts by inmates to pursue direct appeals from the convictions for which they were incarcerated, or habeas petitions, [or] 'civil rights actions'—i.e., actions under 42 U.S.C. § 1983 to vindicate 'basic constitutional rights.'

Id. at 352-55 (internal citations omitted).[16]

2. *Pro Per* Criminal Defendants' Right of Access to the Courts

In *Faretta v. California*, 422 U.S. 806, 818-20 (1975), the United States Supreme Court held that the Sixth Amendment entitles criminal defendants to decline state-appointed counsel and represent themselves. The general rule is that, merely by offering counsel, the state fulfills its obligation to provide access to the courts to *pro per* criminal defendants.[17] In the Ninth Circuit, however, the state's duties are unclear.

In *United States v. Wilson*, 690 F.2d 1267 (9th Cir. 1982), a magistrate denied Wilson's request to represent himself during his criminal trial. Wilson objected. During the first day of trial, the magistrate asked Wilson whether he still wanted to proceed *pro per*. Wilson declined, explaining that he had never received access to a law library. Eventually, Wilson agreed to let appointed counsel handle his trial. Wilson filed a petition for a writ of habeas corpus, arguing that the magistrate's conduct violated his Sixth

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[16] *Toussaint* seems incompatible with *Lewis* to the extent it did not impose an "actual injury" requirement and "conclude[d] that *all* prisoners are entitled to meaningful access to the courts." *Toussaint*, 801 F.2d at 1110 (emphasis in original).

[17] *See, e.g., United States v. Byrd*, 208 F.3d 592, 593 (7th Cir. 2000) ("when a person is offered appointed counsel but chooses instead to represent himself, he does not have a right to access to a law library"); *United States v. Taylor*, 183 F.3d 1199, 1204-05 (10th Cir. 1999) ("a prisoner who voluntarily, knowingly and intelligently waives his right to counsel in a criminal proceeding is not entitled to access to a law library or other legal materials"); *United States v. Kincaide*, 145 F.3d 771, 778 (6th Cir. 1998) ("the state does not have to provide access to a law library to defendants in criminal trials who wish to represent themselves") (quotation omitted); *United States v. Pina*, 844 F.2d 1, 5 n.1 (1st Cir. 1988) ("[w]hen a defendant refuses assistance of appointed counsel he has no right to unqualified access to a law library or the materials therein"); *Degrate v. Godwin*, 84 F.3d 768, 769 (5th Cir. 1986) ("having rejected the assistance of court-appointed counsel, [the prisoner] had no constitutional right to access a law library in preparing the *pro se* defense of his criminal trial"); *United States v. Lane*, 718 F.2d 226, 231 (7th Cir. 1983) ("the offer of court-appointed counsel to represent a defendant satisfies the constitutional obligation of a state to provide a defendant with legal assistance under the Sixth and Fourteenth Amendments"); *United States v. Chatman*, 584 F.2d 1358 (4th Cir. 1978) ("to the extent that it may be said that *Bounds* has any application to the instant case, the United States satisfied its obligation under the [S]ixth [A]mendment when it offered defendant the assistance of counsel").

Amendment rights under *Faretta* and his Fifth Amendment rights under *Bounds*. The Ninth Circuit rejected both arguments and held that the state complied with the Fifth and Sixth Amendments simply by appointing a lawyer to represent Wilson. *Id*. at 1271-72.

Yet in *Milton v. Morris*, 767 F.2d 1443 (9th Cir. 1985), the Ninth Circuit construed *Wilson* narrowly. *Milton* granted a habeas corpus petition when a prisoner invoked his *Faretta* right of self-representation, but the state denied him "access to research materials, advisory counsel, means to serve subpoenas, or effective use of a telephone." Judge Schroeder's majority opinion distinguished *Wilson* on the grounds that while the prisoner there ultimately received counsel's assistance, the prisoner in *Milton* "lacked all means of preparing and presenting a defense, and was unjustifiably prevented from contacting a lawyer or others who could have assisted him." *Id*. at 1446. In addition, Judge Schroeder declined to consider the extent to which *Bounds*, "plac[ed] an affirmative duty upon the state to provide a library for the defendant who has rejected the assistance of counsel for trial" because "*Faretta* controls this case." *Id*. at 1446. Judge Schroeder concluded that *Faretta* requires states to provide "*some* access . . . to law books, witnesses, or other tools to prepare a defense." *Id*. (emphasis added). Judge Schroeder noted, however, that "this right is not unlimited" and that "[s]ecurity considerations and avoidance of abuse by opportunistic or vacillating defendants may require special adjustments." *Id*. Judge Hug concurred with Judge Schroeder, but wrote separately to emphasize that although the state must provide criminal defendants who proceed *pro per* "reasonable access to resources," the state enjoys substantial leeway in meeting this standard. *Id*. at 1447-48 (Hug, J., concurring).[18]

Similarly, in *Taylor v. List*, 880 F.2d 1040 (9th Cir. 1989), the Ninth Circuit distinguished *Wilson*. Because Taylor had been involved in a riot, prison officials precluded him from visiting the law library. Taylor obtained a court order permitting him access to inmate law clerks and the opportunity to check out books from the library. Taylor sued, arguing that prison officials violated his Sixth Amendment rights by ignoring this order. Relying on *Wilson*, the district court granted defendants' motion for summary judgment.

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[18] Judge Beezer also concurred, but on the "much narrower ground" that a state court had ordered prison officials to provide "a certain number of local and long distance phone calls, and to have access to a runner, investigator, and expert witness" and then "expressly found" that they had not complied. *Milton*, 767 F.2d at 1448 (Beezer, J., concurring).

The Ninth Circuit reversed, noting that *Wilson* "did not conclusively resolve th[e] issue" of whether *Faretta* "place[s] an affirmative duty upon the state to provide access to a law library for a pre-trial detainee who has rejected counsel and chosen to represent himself" because the prisoner in *Wilson* "had ultimately accepted representation by counsel at trial." *Taylor*, 880 F.2d at 1047 & n.4. In addition, the court cited *Milton* for the proposition that the Sixth Amendment "includes a right of access to law books, witnesses, and other tools necessary to prepare a defense." *Id*. at 1047. The court thus determined that factual issues remained as to whether certain defendants violated this right by preventing Taylor from "access[ing] law books and witnesses." *Id*. at 1048-49.

In *United States v. Robinson*, 913 F.2d 712 (9th Cir. 1990) the court struck a middle ground between *Wilson* and *Milton*. Robinson, who faced drug charges, accumulated six large boxes and three bags of legal materials. However, because Robinson had accepted counsel, the district court denied his motion to access these materials. Robinson then elected to represent himself. The district court allowed Robinson to access "one large storage box" of materials. *Id*. at 717. On appeal, Robinson argued that his *Faretta* waiver was "involuntary" because the district court "forced him to choose between his right to counsel and his 'right' of access to case documents and other legal materials." *Id*. The Ninth Circuit disagreed, noting that "a criminal defendant may be asked to choose between waiver and another course of action, so long as the course of action offered is not constitutionally offensive." *Id*. The court reasoned that "*Wilson* suggests [both that] there is nothing constitutionally offensive about requiring a defendant to choose between appointed counsel and access to legal materials [and that] the [S]ixth [A]mendment is satisfied *by the offer of professional representation alone*." *Id*. (emphasis added). The court then cited Judge Hug's concurrence in *Milton* for the contention that "[a] *pro se* defendant's right of 'some access' to resources to aid the preparation of his defense must, however, be balanced against security considerations and the limitations of the penal system." *Id*. The court affirmed the district court's order that Robinson had to pare down his materials because it stemmed from logistical considerations. *Id*. at 717-18.

Finally, in *U.S. v. Sarno*, 73 F.3d 1470 (9th Cir. 1995), Nash, a law school graduate who had not passed the bar examination, appealed his conviction for white collar offenses. Nash chose to represent himself at trial even though he was serving time for a prior, unrelated offense. Nash contended that the prison officials had denied him reasonable access to the law library. The court began by "agree[ing] that

the Sixth Amendment demands that a *pro se* defendant who is incarcerated be afforded reasonable access to 'law books, witnesses, or other tools to prepare a defense.'" *Id*. at 1491 (quoting *Milton*, 767 F.2d at 1446). The court was "troubled" by the fact that Nash only had access to the library for about five hours per week during trial. *Id*. However, the court noted that the law library was only open during business hours, which was also when Nash was in trial. *Id*. The court reasoned that "while a prison must take steps to provide incarcerated defendants with reasonable access to legal materials, the rights of a *pro se* defendant must be balanced against institutional resource constraints" and held that Nash's constitutional rights were not violated. *Id*.

Lewis requires that a post-conviction inmate must show "actual injury" to prevail on a *Bounds* claim. *See Lewis*, 518 U.S. at 352. Although *Bounds* is rooted in the Fifth Amendment and *Milton* stems from the Sixth Amendment, *Lewis*' "actual injury" requirement seems to contradict the Ninth Circuit's repeated declarations that denial of access to the courts *itself*—regardless of whether it prejudices a *pro per* criminal defendant's case—works a legally cognizable harm. *Compare Lewis*, 518 U.S. at 530 ("the distinction between the [political branches and the courts] would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, but merely the status of being subject to a governmental institution that was not organized or managed properly") *with Milton*, 767 F.2d at 1446 (*Faretta* requires states to provide "some access . . . to law books, witnesses, or other tools to prepare a defense") *and Taylor*, 880 F.2d at 1047 (*Faretta* "includes a right of access to law books, witnesses, and other tools necessary to prepare a defense") *and Sarno*, 73 F.3d at 1491 (*Faretta* "demands that a *pro se* defendant who is incarcerated be afforded reasonable access to law books, witnesses, or other tools to prepare a defense") (quotation omitted).[19] Thus, there is some tension between *Lewis* and *Milton*.[20]

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[19] In fact, before *Lewis v. Casey*, the Ninth Circuit did not impose an 'actual injury' requirement" for claims asserting "core" *Bounds* violations. *See Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989).

[20] In addition, *Lewis* defined "actual injury" as the inability to file a non-frivolous criminal appeal, habeas petition, or civil rights claim—but *not* the inability to "litigate effectively once in court." *Id*. at 354. A *pro per* criminal defendant's *Faretta* claim, by definition, seeks redress for the inability to "litigate effectively once in court."

The court believes that *Lewis* narrowed the scope of the Ninth Circuit's *Faretta* access to the court cases to the extent they suggest that prison officials can violate *pro per* criminal defendants' Sixth Amendment rights simply by providing inadequate libraries or legal assistance. *See Lewis*, 518 U.S. at 351 (there is no "an abstract, freestanding right to a law library or legal assistance"). In fact, no case of which this court is aware has held that officials violated an inmate's *Faretta* rights in such a manner. Instead, courts have only found *Faretta* violations where the state engaged in egregious obstructionist conduct. *See Milton*, 767 F.2d at 1444-45 (prison officials violated *pro per* criminal defendant's Sixth Amendment rights when they (1) forced him to use law books that were at least twenty-seven years old and (2) misinterpreted a court order and thus deprived him of ability to obtain investigator or witnesses); *Taylor*, 880 F.2d at 1042-43 (*pro per* criminal defendant raised triable issue of fact on *Faretta* claim by contending that jail officials ignored court order permitting him to request law books and visit with inmate law clerks). This reading—that the state cannot deprive a *pro per* criminal defendant of "all means of preparing and presenting a defense," *Milton*, 767 F.2d at 1446—is consistent with *Lewis*. *See Lewis*, 518 U.S. at 353 n.4 (acknowledging that constitutional violations likely occur "[w]here the situation is so extreme as to constitute an *absolute* deprivation of access to *all* legal materials") (quotation marks omitted) (emphasis in original). In addition, after *Lewis*, a *pro per* criminal defendant can bring a Sixth Amendment claim if he proves that flaws in the prison's research system affected his case in an outcome-determinative manner. A prisoner who contends that he was unable to research a tangential matter or pursue an issue that could not possibly have exonerated him may have been "injured" in a metaphysical sense, but cannot state a claim for "*relevant* injury in fact, *i.e.*, injury-in-fact *caused by the violation of the legal right*." *Id*. (emphasis in original). By the same token, a prisoner who establishes that the prison's research system ruined an arguably exculpatory motion has been "injured" even under *Lewis*' restrictive interpretation. *See id*. at 353 n.3 ("actual injury" includes "being deprived of something of value").

In their sur-reply, prisoners raise two arguments about the relationship between *Lewis* and *Milton*. First, prisoners cite *Benjamin v. Fraser*, 264 F.3d 175 (2d. Cir. 2001) for the proposition that "*Lewis* is inapplicable to Sixth Amendment claims of pretrial detainees." Sur-Reply at 10:9-11 (quoting *Benjamin*, 264 F.3d at 185). *Benjamin* held that prospective relief was necessary under the PLRA to remedy the fact that lawyers often experienced substantial delays when they tried to meet with pretrial detainees. The

Second Circuit rejected prison officials' argument that *Lewis* required inmates to show "actual injury"—that the burden on the attorney-prisoner relationship manifested itself in "an identifiable detrimental effect." *Benjamin*, 264 F.3d at 185. Nevertheless, *Benjamin* reached this conclusion in a manner that does not support prisoners' contention. *Benjamin* explained that, unlike the *Bounds* right of access to the courts, the right to legal representation does not require "actual injury" because it is a textual constitutional right:

> *Lewis*'s reasoning is premised on the distinction between the standing required to assert direct constitutional rights versus the standing required to assert claims that are derivative of those rights. Because law libraries and legal assistance programs do not represent constitutional rights in and of themselves, but only the means to ensure a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts, prisoners must demonstrate "actual injury" in order to have standing . . . . By contrast, where the right at issue is provided directly by the Constitution or federal law, a prisoner has standing to assert that right even if the denial of that right has not produced an "actual injury."

Id. at 184-85. Unlike the right to legal representation, the right of "some access . . . to law books, witnesses, or other tools to prepare a defense," *Milton*, 767 F.2d at 1446, is *not* a textual Sixth Amendment right. Under *Benjamin*'s logic, *Milton*'s "some access" requirement is "derivative" of a "direct constitutional right" and, like *Lewis*, requires "actual injury."[21] Therefore, *Benjamin* does not change the court's conclusion that it must view *Milton* with an eye toward *Lewis*.

Second, prisoners argue that they do not need to prove "actual injury" because they "do not need to prove that they have standing to *defend* themselves against the County's attempt to strip them of their constitutional rights." Sur-Reply at 9:18-19 (emphasis in original). A close reading of *Lewis* undermines this argument. "Actual injury" is not just an aspect of the standing inquiry. It is also a necessary element of prisoners' *substantive* claims. *Lewis* makes clear that *certain kinds* of "injuries" are *not* "actual": for example, when an inadequate prison law library causes a prisoner to file a defective securities action or fail to litigate effectively in court. *See id*. at 354 ("the injury requirement is not satisfied by just any type of frustrated legal claim"). These types of claims constitute *damnum sine injuria*: "harm of which the law takes no account." Black's Law Dictionary 420-21 (8th ed. 2004) (quotation omitted). Thus, even though

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[21] Also, *Benjamin* noted that *Lewis* did not control because a previous Supreme Court case was directly on point. *See Benjamin*, 264 F.3d at 186 ("denial of access to counsel for consultation 'is not subject to [ ] prejudice analysis') (quoting *Perry v. Leeke*, 488 U.S. 272, 280 (1989)) (alteration supplied by *Benjamin*). Here, there is no such authority.

prisoners do not have to establish standing, the "actual injury" requirement shapes the contours of their constitutional rights. Without evidence that LRA has harmed prisoners in the specific ways contemplated by *Lewis* and this court's reading of *Milton*, the court cannot conclude that there is "a current and ongoing violation of . . . the Federal right." 18 U.S.C. § 3626(b)(3).

With these principles in mind, it is helpful to clarify what is not at issue in this case. Prisoners set forth numerous criticisms of LRA as a legal research system. For example, according to prisoners' experts, LRA compares unfavorably to a physical law library.[22] In addition, each prisoner offers generalized complaints about LRA: that (1) it does not maintain prisoner confidentiality,[23] *see* Hopkins Decl. ¶ 15; Lyons Decl. ¶ 7; Reyes Decl. ¶ 29; Golden Decl. ¶ 6; Walker Decl. ¶ 28(a); Bautista Decl. ¶ 31; (2) it takes too long to respond, *see* Hopkins Decl. ¶ 9 Capela Decl. ¶ 10(c); Lyons Decl. ¶ 6; Reyes Decl. ¶ 8; Golden Decl. ¶ 8; Walker Decl. ¶ 14; Bautista Decl. ¶ 15; (3) it does not offer tables of contents or indexes, *see* Golden Decl. ¶ 11; Walker Decl. ¶¶ 8-11; (4) it fails to offer specific secondary sources, *see* Capela Decl. ¶ 10(a); Reyes Decl. ¶ 14; Golden Decl. ¶ 12; Bautista Decl. ¶¶ 21(a)-(z); (5) it does not provide a master list of available materials, *see* Hopkins Decl. ¶ 16; Walker Decl. ¶ 13; (6) it sometimes fails to understand the inmate's request, *see* Hopkins Decl. ¶ 10; Bautista Decl. ¶ 17, and (7) the back-and-forth between LRA and inmate is frustrating, *see* Hopkins Decl. ¶ 12; Reyes Decl. ¶ 27; Bautista Decl. ¶ 14. These alleged inadequacies—unconnected to claims of total preclusion from legal research, the denial of an important criminal trial motion or non-frivolous criminal appeal, request for habeas corpus, or civil rights complaint—are not constitutional deficiencies. After *Lewis*, an inmate can only succeed on an access to the courts claim by showing that a library's flaws affected specific aspects of his case.[24]

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[22] These individuals are Steven Manchester ("Manchester"), a criminal law expert, Amy Hale-Janeke ("Hale-Janeke"), a professional law librarian, and Michael Sullivan ("Sullivan"), who performed an analysis of LRA's response time to prisoners' research requests.

[23] Prisoners note that, in *People v. DeMarco*, 2001 WL 1215851 (Cal. Ct. App. 2001), LRA "produced inmate request forms to a district attorney and [Williams] personally testified during the inmate" in order to rebut his assertion of the insanity defense. Opp. Mot. Term. Consent Decrees at 17:16-21. This is troubling. However, this inmate was incarcerated in Alameda County, and does not appear to be properly within the scope of this motion.

[24] Accordingly, the court need not rule on the County's motion to exclude Manchester and Hale-Janeke's declarations.

3. Whether the PLRA Mandates Termination of the Access to the Courts Decree

The court cannot terminate the Access to the Courts Decree merely because Judge Peckham did not make "explicit findings" that "'the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.'" *Gilmore*, 220 F.3d at 1007 n.25 (quoting 18 U.S.C. § 3626(b)(2)).[25] The court must inquire whether any part of the Decree requires the County to do more than the Constitution mandates. If so, the Decree "qualifies for termination" under § 3626(b)(2). *Id*. at 1007 ("a district court cannot terminate prospective relief without determining whether the existing relief (in whole or in part) exceeds the constitutional minimum"). The court must eliminate superfluous sections while preserving provisions necessary to prevent constitutional violations. *Id*. at 1007 n.25 ("[i]f the existing relief qualifies for termination under § 3626(b)(2), but there is a current and ongoing violation, the district court will have to modify the relief to meet the Act's standards"). When it performs this task, the court may impose obligations upon the County that exceed the constitutional floor—whether in the form of modifying or upholding existing provisions—if doing so is the only way to "craft[ ] an effective remedy" for ongoing violations. *Id*. at 1006 n.23.

a. Whether the Access to the Courts Decree Qualifies for Termination Under § 3626(b)(2)

The Access to the Courts Decree is terminable under § 3626(b)(2). The Decree is not "narrowly drawn," does "extend[ ] . . . further than necessary to correct the violation of the Federal right," and is not "the least intrusive means necessary to correct th[is] violation." *Id*. The Decree requires the County to "establish" and "maintain" a law library and legal assistance program. Schmid Decl. Ex. A at 2, 8. As *Lewis* illuminates, there is no absolute constitutional right to either. *See also Kane v. Garcia Espita*, --S. Ct.-- 2005 WL 2838601 *1 (Oct. 31, 2005) (per curiam) (reversing grant of habeas petition because there is no clearly-established Sixth Amendment right to a law library). Instead, jail officials enjoy the

[25] This requirement is known as the "need-narrowness-intrusiveness" test. *See Benjamin v. Fraser*, 343 F.3d 35, 49 (2d Cir. 2003).

freedom to fulfill their constitutional obligations as they see fit.[26] Also, nothing in the Decree limits the availability of the library or legal assistance programs to the discrete categories of inmates who are entitled to them. Because the Decree saddles the County with duties that the Constitution does not require, it "qualifies for termination." *Gilmore*, 220 F.3d at 1008.

b. Whether Portions of the Access to the Courts Decree Remain Necessary to Correct Ongoing Constitutional Violations

The County has met its burden of demonstrating the absence of "a current and ongoing violation of [f]ederal right." 18 U.S.C. § 3626(b)(3). First, with respect to criminal *pro per* issues, the County conclusively proves that it did not deprive prisoners of "all means of preparing and presenting a defense." *Milton*, 767 F.2d at 1446.[27] Instead, each prisoner meaningfully participated in his criminal trial. *See* Hopkins Decl. ¶¶ 6(a)-(y) (Hopkins "made over 100 requests to LRA for legal research materials" as a criminal *pro per*, filed over thirty motions, and succeeded at least in part on about thirteen); Capela Decl. ¶¶ 11(a)-(g); Williams Reply Decl. Ex. D (Capela submitted eighteen requests to LRA as a criminal *pro per*, received 827 pages of material, filed two *Pitchess* motions, a motion for an investigator, a motion to dismiss, a motion to set aside the information, two motions to reduce bail, and two motions for advisory counsel); Lyons Decl. ¶¶ 13(a)-(j); Williams Reply Decl. ¶ 19 (Lyons submitted thirty research requests, received 1,055 pages of material, filed a *Pitchess* motion, a motion to set aside the information, and motions requesting an investigator, a reduction in bail, and the appointment of an expert); Reyes Decl. ¶¶ 13(a)-(j); Williams Reply Decl. ¶ 19 (Reyes submitted twenty-nine requests, received 1,501 pages of material, filed a motion for discovery, a *Pitchess* motion, a motion for sentencing transcripts, a motion to dismiss, and two motions for a continuance); Golden Decl. ¶¶ 14(a)-(o) (Golden filed approximately

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[26] Prisoners assert that LRA "does not resemble" any of the "various 'alternatives'" that courts have indicated may properly take the place of a law library. Opp. Mot. Term. Consent Decrees at 33:14. However, in *Lewis*, the Supreme Court suggested that prison officials might "experiment" by "replac[ing] libraries with some minimal access to legal advice and a system of court-provided forms . . . that asked the inmates to provide only the facts and not to attempt any legal analysis." *Lewis*, 518 U.S. at 352. LRA resembles *Lewis*' hypothetical research system. *See* Williams Reply Decl. ¶ 11 (LRA "enable[s] an inmate to obtain extensive information on a topic of interest without knowing the technical name of a procedure or subject, a specific code section, or a specific research resource"); *see also Kaiser v. County of Sacramento*, 780 F. Supp. 1309, 1315 (E.D. Cal. 1991) (refusing to enjoin legal research system similar to LRA).

[27] It is undisputed that the County offered to appoint counsel for each defendant.

sixteen motions as a criminal *pro per* and succeeded on two); Bautista Decl. ¶¶ 6(a)-(x) (Bautista filed over thirty motions as a criminal *pro per* and at least partially succeeded on about eight). Even under the Ninth Circuit's pre-*Lewis* authority, the County fulfilled its Sixth Amendment obligations by facilitating prisoners' active self-representation.

Second, as discussed in detail below, the record reveals that the County has provided prisoners with reasonable access to the courts. Only some of prisoners' criticisms of LRA relate to important criminal motions, criminal appeals, habeas petitions, or civil rights complaints. Even with respect to those types of filings, prisoners fail to offer concrete evidence that LRA's flaws, and not some other factor, frustrated their claims. The court is cognizant of the fact that the County, not prisoners, must "prove its compliance with inmates' right of access to the courts." *Gilmore*, 220 F.3d at 1008. However, there is one important respect in which *Gilmore* does not seem to assign the burden of proof entirely to the County. *Gilmore* notes that the lower court "correctly read [*Lewis v.*] *Casey* to require evidence of actual injury . . . ." *Id*.[28] Whether construed as prisoners' failure of proof or the County's successful negation of an essential element of prisoners' constitutional claims, the lack of "evidence of actual injury" dooms prisoners' attempt to establish that prospective relief remains necessary to correct violations of their right of access to the courts.

i. Hopkins

Hopkins claims that LRA failed him on three motions he filed as a criminal *pro per*. First, Hopkins asserts that he filed a motion seeking to release documents produced pursuant to a subpoena *deuces tecum*. Hopkins Decl. ¶ 6(d). Hopkins contends that the court denied the motion. *Id*. According to Hopkins, he later discussed this motion with Traci Owens ("Owens"), his public defender, who informed him that (1) the court would have granted the motion if he "had . . . used the proper legal terminology" and (2) he could not bring the motion again because the court had already denied it. *Id*. at ¶ 20. However, the County correctly argues that Hopkins' version of what Owens told him is inadmissible hearsay: it is an out-of-court statement offered to prove the truth of the matter asserted. *See* Fed. R. Evid. 802. In addition,

[28] *Gilmore* then quoted *Lewis* for the proposition that "'the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.'" *Id*. at 1008 n.26 (quoting *Lewis*, 518 U.S. at 351)).

Owens did not file a declaration in this case. Thus, the court could not conclude that Hopkins' lack of success stemmed from LRA's flaws without engaging in speculation.

Second, Hopkins asserts that he filed a motion to dismiss the prosecution against him under the *ex post facto* clause. Hopkins Decl. ¶ 17(a). Hopkins claims that he "withdrew the motion before the court ruled on it" because he "was unable to properly research it using LRA's services." *Id*. Although Hopkins argues that LRA's "response . . . was unhelpful," he has failed to provide any research requests or responses from LRA with respect to this motion. *Id*. Hopkins also testified that he never discussed the merits of the motion with his lawyer, and does not know whether it would have been successful. Hopkins Depo. at 73:7-18. Without more, the court cannot determine whether Hopkins' motion had any merit whatsoever.

Third, Hopkins claims that he filed a motion to compel a witness to appear for cross-examination during his preliminary examination. Hopkins Decl. ¶ 17(b). At the preliminary examination, a police officer testified that Nicholas Burns ("Burns"), a loss prevention officer at Home Depot, had observed Hopkins walk out of the store without paying for a set of power tools. Request for Judicial Notice Supp. Mot. Term. Consent Decrees ("RJN") Ex. AA at 8-10.[29] The officer then testified that Hopkins admitted that "he had an expensive drug habit and stole the tools to buy drugs." *Id*. at 12. The officer claimed that he searched Hopkins and found a crack pipe in his jacket pocket. *Id*. Burns did not appear at the preliminary hearing, preventing Hopkins from cross-examining him. *Id*. at 20. Hopkins asserts that, after the preliminary hearing, he tried to use LRA to file a motion to compel Burns to testify. Hopkins Decl. ¶ 17(b). According to Hopkins, however, LRA's "cumbersome nature" prevented him from filing the motion for approximately one month. *Id*. The criminal trial court denied the motion because it was neither properly served nor timely. Hopkins Decl. Ex. 1. However, the one piece of tangible evidence Hopkins has offered in support of this claim—the court's denial of the motion—indicates that Hopkins sought to hold Burns in contempt, not to compel his appearance. *Id*. Thus, even if Hopkins had succeeded on the motion, he would not necessarily have received the opportunity to cross-examine Burns. Moreover, the criminal trial

[29] The prisoners do not oppose the County's request for judicial notice to the extent it pertains to records from their criminal trials.

court (1) found Hopkins' offer of proof insufficient to call Burns at the preliminary hearing and (2) determined that there was probable cause to charge Hopkins. RJN Ex. AA at 21-29. In light of the other evidence presented at the preliminary hearing—including Hopkins' damaging admission—it is highly unlikely that Hopkins' failure to cross-examine Burns contributed to the court's probable cause determination.

Hopkins also argues that LRA impaired his ability to file two habeas petitions. First, Hopkins asserts that he "requested information from LRA to help" with a motion for access to the courts, but "LRA failed to provide [him] with any useful information." Hopkins Decl. ¶ 17(c). Yet Hopkins does not allege that he ever filed the motion or that the court denied it. In addition, in April 2004, Hopkins filed a motion for access to the courts that included detailed points and authorities, including a citation to *Bounds*. RJN Ex. EE. at 3.

Second, Hopkins claims that he was unable to properly argue a habeas petition that sought an order compelling the DOC to provide him with a hernia operation. *Id*. at ¶ 17(d); RJN Ex. BB. The court denied the motion because of a *factual* defect: Hopkins failed to corroborate his claim that the operation was necessary with independent evidence that the hernia could be life-threatening. RJN Ex. CC at 1. There is no evidence that LRA was responsible for the court's denial of Hopkins' motions. Accordingly, Hopkins has failed to show that LRA "actual[ly] injured" him.

ii. Capela

Capela's most serious allegation is that LRA prevented him from challenging a charge that the district attorney improperly added after the preliminary hearing in his criminal case.[30] Capela Decl. ¶ 9. The hearing took place on September 15, 2003. Capela Depo. at 17:25-18:2. At this time, a public defender represented him. Capela Decl. ¶ 3. On September 29, 2003 the district attorney filed an

[30] In addition, Capela contends that he was unable to review potential jury instructions or "legal issues related to my charges such as motive." Capela Decl. at ¶¶ 13-16. However, he did not recall ever submitting a request to LRA for information on jury instructions or motive. Capela Depo. at 143:19-24. He also asserts that he was unable to research how to subpoena a key defense witness. Capela Decl. ¶ 15. Yet he does not name this individual in his declaration nor state what his testimony would have revealed. Likewise, he could not answer these questions at his deposition. Capela Depo. at 197:13-203:11.

information that included an additional a felony attempted robbery charge. RJN Ex. A.[31] On November 19, 2003 the district attorney filed a first amended information, which also included this charge. RJN Ex. B. That same day, Capela filed a request to proceed *pro per*. Capela Depo. at 19:18-23:4; Capela Decl. ¶¶ 2-4.

Capela requested research materials on how to strike the late-filed charge three times. According to Capela, LRA's first response "was unhelpful, as it simply set forth the [d]istrict [a]ttorney's procedures for filing charges." *Id*. at ¶ 9(a). However, Capela admits that he made this request when the public defender still represented him. *Id*. Because Capela was not *pro per*, the County was under no obligation to provide him access to the courts. *See Wilson*, 690 F.2d at 1271-72 (state fulfills its duties under both Fifth and Sixth Amendments by appointing lawyer to represent criminal defendant). Capela argues that he then drafted a request that specifically asked "whether it was legal for the [d]istrict [a]ttorney to file felony charges after the preliminary hearing without new evidence." *Id*. at ¶ 9(b). Again, LRA "failed to provide [him] with useful information. *Id*. Capela claims that he finally received helpful information in response to his third request. *Id*. at ¶ 9(c). Capela contends that the information LRA produced revealed both that the charge was improper and that he had waived any objection to the district attorney's conduct by proceeding with the trial. *Id*. Nevertheless, Capela has failed to provide any tangible evidence of his requests or LRA's responses. Moreover, a district attorney may properly add charges against a defendant so long as they are "shown by the evidence taken at the preliminary hearing," Cal. Pen. Code § 1009, or "aris[e] out of the transaction upon which the commitment was based." *People v. Burnett*, 71 Cal. App. 4th 151, 165-66 (1999). Without more evidence about Capela's preliminary hearing, the court cannot conclude that the district attorney's conduct was, in fact, improper.

iii. Lyons

Lyons contends that LRA's flaws caused the criminal trial court to reject two motions. First, he requested information on how to file a *Pitchess* motion on May 4, 2004. Lyons Decl. ¶ 10. He asserts that LRA sent him a sample motion, which he used. *Id*. According to Lyons, the judge asked him to re-file the motion because "it was incomplete." *Id*. Lyons alleges that he then asked LRA "how to [

[31] The district attorney also added two additional felony assault charges. These court later reduced these charges to misdemeanors. Capela Decl. at ¶¶ 9(a)-(d).

]file a complete motion." *Id*. He claims that LRA then re-sent the same sample motion that the judge had previously rejected. *Id*. However, other than his original request to LRA, Lyons offers no evidence to substantiate his claims. Lyons testified that the judge instructed him to "file more for the motion." Lyons Depo. at 74:17-21. Yet because the motion consists entirely of case citations, it is likely that the judge wanted more factual—as opposed to legal—support. RJN Ex. T. In any event, Lyons cannot demonstrate that the criminal trial court's denial of his *Pitchess* motion affected the outcome of his case.

Second, Lyons claims that, on May 16, 2004, he requested research on setting aside an information for the improper addition of a charge after the preliminary hearing. Lyons Decl. ¶ 11. On the request, he indicated that he had a hearing in two days. Lyons Decl. Ex. C. He claims that he received a response from LRA shortly before the filing deadline, which led the court to reject the motion as untimely. Lyons Decl. ¶ 11. However, in his deposition, he testified both that (1) he was eventually able to re-file the motion and (2) he was aware of the additional charge approximately one month before he first requested information from LRA:

> Q. Okay. Is there any reason why you didn't go ahead and file this motion, refile it timely?
>
> A. I did refile it.
> Q. But did you ever refile it giving the 15 days notice?
> A. Yes.
> ***
> Q. Could you have requested the information on the . . . motion at any time from April 7th until May 16th?
> A. Yes, I could.
> Q. But you did not?
> A. No.
> Q. That was your choice?
> A. Yes.

Lyons Depo. at 95:2-7; 97:10-17. Thus, it is unclear whether Lyons was able to present this claim to the criminal trial court. In addition, it appears that the untimely filing stemmed more from Lyons' delay in requesting information than any delay on the part of LRA.[32]

iv. Reyes

Reyes, who represented himself in three criminal cases, claims that LRA's responses were often inadequate. On November 7, 2003, he requested information (1) on time limits for receiving a police

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[32] Lyons also claims that he requested research on Proposition 115 and never received an answer. Lyons Decl. ¶ 12. However Lyons does not indicate why he was researching this issue.

report and discovery and (2) for California Penal Code sections 1203.07(a)(11) and 148(A)(1). Reyes Decl. Ex. A. LRA's response contained only "a printout of . . . section 148(A)(1) [and] a crossed-out copy of [his] request." *Id*. at ¶ 10. However, he admits that he was represented by a public defender at this time. *Id*. at ¶ 3 ("[f]rom approximately September 2003 to December 2003, I was represented by a public defender in my criminal cases"). Thus, he made this request at a time when he had no constitutional right to court access beyond that available through his appointed counsel.

On December 2, 2003, after Reyes was certified *pro per*, he filed a request for "a full complete discovery pkg [sic] points & authorities and also time limits and deadlines on receiving a police report and discovery" and California Code of Civil Procedure "100 through 1350." Reyes Decl. Ex. B. Reyes claims that, despite the fact that he faced drug charges, he received a packet that related only to conducting discovery in a robbery case. *Id*. at ¶ 11. In addition, he asserts that the packet "contained no points or authorities or sample motions." *Id*. However, LRA's records indicate that he received a 71-page criminal packet in response to this request. Williams Reply Decl. Ex. G. In addition, during his deposition, he testified that he could not remember whether the discovery packet contained points and authorities. Reyes Depo. at 79:24-80:15. Finally, it is not clear that he ever filed a motion for discovery in his drug case.

On January 29, 2004 Reyes requested information on a motion to suppress evidence under California Penal Code section 1538.5, specifically asking for "case law where evidence [was] suppressed for failure to establish and maintain the chain of evidence." Reyes Decl. Ex. E. He claims that LRA provided him with a sample motion for suppression of evidence but "no information regarding the chain of custody." *Id*. at ¶ 20. LRA's records indicate that it responded with a seventy-three page criminal packet on February 4, 2004. Williams Reply Decl. Ex. E. However, it does not appear that Reyes ever filed a motion to suppress.

Also on January 29, 2004 Reyes requested information on California Penal Code section 1047 to file a *Pitchess* motion. Reyes Decl. Ex. F. He indicated that he had a hearing on March 9, 2004. *Id*. He claims that he did not receive a response for ten days and that it took two months to prepare the *Pitchess* motion, which the court denied. Reyes Decl. ¶ 17. However, LRA's records show that it received Reyes' request on March 3 and provided forty-one pages, including one statute and two criminal packets, on

March 4. Williams Reply Decl. Ex. G. In addition, Reyes does not indicate why the court denied the motion.

On February 2, 2004 Reyes requested "a notice of motion to hold defaulting [a] witness in contempt, information regarding filing a motion for a continuance, and a sample motion for the "non-arresting officer exemption" under California Penal Code section 1047. Reyes Decl. Ex. I. He indicated that his next court date was February 10. *Id*. According to Reyes, he received LRA's response "approximately ten days later," and the court denied his motion for a continuance. *Id*. at ¶ 21. However, LRA's records reveal that it sent Reyes three statutes and one criminal packet comprised of sixteen pages on February 6: four days after his request. Williams Reply Decl. Ex. G. Moreover, Reyes again does not explain why the court denied the motion.

Reyes' remaining complaints suffer from similar flaws. On March 2, 2004 he asked for information on how "to strike prior violent or serious felony convictions . . . 'in the furtherance of justice['] pursuant to California Penal Code section 1385. Reyes Decl. Ex. J. He claims that LRA's response contained "only the statutory text of [s]ection 1385." *Id*. at ¶ 23.[33] According to LRA's record, however, Reyes received a twenty-four page criminal packet in response to this request. Williams Reply Decl. Ex. G. Also on March 2, 2004 Reyes sought points and authorities on "bail" and being released on one's "own recognizance." Reyes Decl. Ex. I. He alleges that he received "a small packet of information pertaining to bail, only twenty or thirty pages." *Id*. at ¶ 24.[34] LRA's records indicate that it sent Reyes eighty pages of material. Williams Reply Decl. Ex. G. On April 1, 2004 Reyes sought a packet on the ABA Standards of Professional Responsibility. Reyes Decl. Ex. L. Reyes claims that he never received a response from LRA. *Id*. at ¶ 24. LRA's records show that it sent Reyes twenty-four pages of material that same day. Williams Reply Decl. Ex. G. Therefore, it appears that Reyes' criticisms of LRA are overstated. More importantly, however, Reyes fails to link LRA's responses to any particular prejudice.[35]

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[33] Reyes' declaration contains two paragraphs numbered "21" and "22." This particular paragraph purports to be paragraph 21 but is, in fact, number 23.

[34] This paragraph is erroneously numbered "22."

[35] Reyes also asserts that he requested information about changing venue and habeas corpus on March 15, 2005. Reyes Decl. ¶ 25. Although Reyes denies receiving any information, Reyes Depo. at 281:15-283:20, LRA's records indicate that he received two criminal packets. Williams Reply Decl. Ex.

v. Golden

Golden claims that, during his criminal trial, he attempted to move a report authored by the district attorney's investigator into evidence. Golden Decl. ¶ 9(a). According to Golden, the report was crucial to his case. *Id*. He asserts that the district attorney successfully prevented him from introducing the report on hearsay grounds. *Id*. at ¶ 9(b). Yet Golden does not explain what this evidence was, or how LRA was responsible for his inability to oppose the district attorney's motion.

In addition, Golden claims that LRA often refused to provide secondary sources. On November 10, 2004 he requested Model Penal Code section 2.13(2)(b) and a footnote from an article in the *Harvard Law Review*. Golden Decl. Ex. 10. LRA responded nine days later by refusing to provide either source. Golden Decl. ¶ 21(a)-(c), Ex. 11. On January 28, 2005 he requested two petitions for *certiorari* identified by Westlaw citation. Golden Decl. Ex. 5. LRA responded five days later with a memorandum stating that the information was not available. Golden Decl. ¶ 16(a), Ex. 6. He claims that he needed these briefs to draft a petition for *certiorari* in his criminal case. Golden Decl. ¶ 16(c). However, he provides no details about the issue for which he sought *certiorari* or whether he did file such a petition.

On February 25, 2005 Golden asked LRA to Shepardize the case citation "99 F.3d 1151." Golden Decl. Ex. 1. LRA responded on March 1 that the case was "not certified for use in court and cannot be cited." Golden Decl. Ex. 2. Golden claims that he submitted a grievance and then received the case. *Id*. at ¶ 15(e). On April 7, 2005 Golden requested a Shepardized copy of California Penal Code section 667(d) and a summary of the cases. Golden Decl. Ex. 7. LRA responded five days later with the text of California Penal Code sections 667(a)-(b), a list of cases that had cited the section, but no summary. Golden Decl. Ex. 8. Again, he asserts that it was only after he submitted a grievance that he received an adequate response. Golden Decl. ¶ 17(f). On April 17, 2005 he asked for "any and all information on the most common line of questioning a witness in a criminal or civil action." Golden Decl. Ex. 19. LRA responded with an excerpt from *California Criminal Defense Practice*. Golden Decl. Ex. 20. Golden then followed up by requesting an article cited in this response. *Id*. at ¶ 29(c). LRA refused to provide this

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B.

article on the grounds that it was a secondary source. Golden Decl. Ex. 21.[36] However, Golden simply does not explain how LRA's refusal to provide these sources led to any particular harm.

vi. Walker

On September 2, 2004 the court certified Walker *pro per* in his criminal case. RJN Ex. DDD. However, during his deposition, Walker testified that he did not file a request with LRA while he was *pro per*. *See* Walker Depo. at 36:25-37:1 ("[t]he only thing[s] I [have] request[ed] from LRA [we]re for my civil cases"). Walker claims that during a May 2005 hearing for an order to direct service on defendants in a civil case, a judge "asked [him] to provide legal authority for a point that arose." Walker Decl. ¶ 18. According to Walker, the judge refused to grant a continuance so Walker could use LRA to find the answer. *Id*. However, under *Lewis*, the County is not required to enable Walker "to litigate effectively once in court." *Lewis*, 518 U.S. at 354-55 (emphasis omitted).

On August 19, 2004 Walker requested the California's Prisoners' Rights Handbook to pursue a civil rights claim. Walker Decl. Ex. E. He contends that LRA did not comply. Walker Decl. ¶ 26. However, he does not specify the specific prejudice that flowed from LRA's refusal. Moreover, the record indicates that his civil rights claim against the County and several DOC employees has survived a motion to dismiss in federal court. RJN Ex. JJJ.

vii. Bautista

Bautista asserts that LRA once sent him a "seven day" memo when he was trying to appeal a civil matter to the Ninth Circuit. Bautista Decl. ¶ 16(a). According to Bautista, because he only had ten days to file a notice of appeal, he was unable to submit the appeal. *Id*. However, under *Lewis*, the County is not required to enable Bautista to appeal civil matters. *See Lewis*, 318 U.S. at 354-55.

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[36] Golden also contends that DOC personnel "conducted improper shakedowns" of his cell, often disturbing his legal materials. Golden Decl. ¶ 31. He asserts that after these shakedowns, his legal materials sometimes went missing. *Id*. Similarly, Bautista claims that he finds legal documents missing after officers perform "walk throughs" of his cell, and Walker alleges that jail personnel (1) erase legal documents from the DOC computer, (2) destroy legal research during "arbitrar[y] cell searches, (3) increase the number and length of lock-downs, and (4) mishandle the mail. Bautista Decl. ¶ 21(e); Walker Decl. ¶ 41. These allegations could give rise to federal civil rights claims. However, because the Access to the Courts Decree does not regulate the manner in which officers conduct searches, maintain the DOC computer, manage lock-downs, or handle mail, Golden, Bautista, and Walker's claims are outside the scope of this motion.

Bautista argues that LRA's failure to provide secondary source material caused the California court of appeals to deny a petition for a writ of prohibition that he filed on December 20, 2004. Bautista claims that the court denied the petition because it was not properly bound and because he did not file a sufficient number of copies. Bautista Decl. ¶ 6(r). However, the appellate court's ruling indicates that it rejected the petition on the merits. RJN Ex. SSS. Bautista also contends that his motion would have been more compelling if LRA had not denied his request for certain secondary sources. Bautista Decl. ¶¶ 21(a) ("I eventually filed a writ without the requested materials, and the writ was denied"); *id*. at ¶ 21(g) ("[i]f I had access to the requested materials, then there is a better chance that my writ would have been granted"); *id*. at ¶ 21(n) ("[i]f LRA had provided me with the requested materials, then I would have file a better petition that might have been granted"). Yet the DOC fulfilled its constitutional duties to Bautista merely by enabling him to file the writ. *See Lewis*, 318 U.S. at 354-55. Bautista also does not allege that the denial stemmed from LRA's flaws. Instead, he merely posits that he would have had a "better chance" of success.

Bautista also claims that because LRA refused to provide a secondary source, *Police Misconduct and Civil Rights*, he has been unable to file a lawsuit stemming from an incident where officers allegedly destroyed his legal research. Bautista Decl. ¶ 21(e). Yet he does not explain why this source is an absolute necessity for filing any such complaint. In addition, he has filed a similar lawsuit against the County and a DOC employee for alleged retaliation. RJN Ex. XXX.

Bautista also contends that LRA has refused to provide several secondary sources. Nevertheless, he either fails to explain the context of each refusal or simply alleges that he would have preferred to use another source. *See* Bautista Decl. ¶ 21(f) (lawsuit was dismissed for failure to state a claim but no indication as to why); *id*. at ¶ 21(i) ("LRA attempted to provide me with substitute information from another publication" but "[t]he other publication has not provided me with the same amount of guidance that the requested material would have given me"); *id*. at ¶ 21(j) ("[i]f LRA had provided me with the requested materials, I would have been able to prepare the motion properly and there would be a greater chance that it would have been granted"); *id*. at ¶ 21(k) ("there would have been a greater chance that the claim would not have been dismissed); *id*. at ¶ 21(w) ("[t]he briefs that I have filed would be more compelling and have greater likelihoods of succeeding if LRA provided me with the requested material"). These allegations are insufficient.

Finally, Bautista claims that several LRA responses were especially galling. First, he requested a section of Witkin & Epstein, *California Criminal Law*. Bautista Decl. Ex. 37. LRA's response indicated that the book's section numbers had changed and asked him to submit a new request. Bautista Decl. Ex. 38. Second, he requested a "Santa Clara County tort claim form." Bautista Decl. Ex. 39. LRA's response did not include such a form but stated that Bautista could receive one if he requested it. Bautista Decl. Ex. 40. Third, he requested a Judicial Council form to sue his landlord for stealing his "[p]ersonal [p]roperty." Bautista Decl. Ex. 39. LRA responded by asking him to "state the type of loss or injury (for example, loss of property or personal injury") and how it happened. Bautista Decl. Ex. 40. Fourth, on January 21, 2005 he requested the index to the *California Criminal Law Forms Manual*. Bautista Decl. ¶ 25. LRA replied by asking him what issues he was researching and how they related to his current case. Bautista Decl. Ex. 45. Fifth, on January 24, 2005 he asked for information and a sample motion regarding severance and joinder. Bautista Decl. ¶ 26. LRA responded by asking "[s]everance and [j]oinder—of what? Offenses or defendants?" Bautista Decl. Ex. 47. Sixth, on September 22, 2004 and February 22, 2004 he requested specific chapters of practice guides. *Id*. at ¶ 27. LRA's responses again asked him to describe the issues he was researching and how they related to his current case. Bautista Decl. Exs. 49, 51. Nevertheless, he fails to explain how he suffered "actual injury." *See* Bautista Decl. ¶ 22 ("[i]f I had direct access to the publication itself, I would have easily found the new section and not [have] been forced to go through this time-consuming process with guarantee of getting the proper section at the end of the day"); *id*. at ¶ 23 (not specifying prejudice that flowed from landlord request); *id*. at ¶ 25(a) ("I fear there may be some motions that would help me prevail in my criminal case that I have not filed simply because I am not aware of them"); *id*. at ¶ 26(a) (asserting without explanation that "I must sever these counts in order to properly defend myself"); *id*. at ¶ 28(b) ("I cannot determine how I should defend myself and whether I should accept a plea bargain"). Thus, there is no evidence that LRA violated Bautista's constitutional rights.

4. Conclusion

There is no evidence that prisoners have suffered "actual injury" because of LRA. Accordingly, the Access to the Courts Decree is not necessary to prevent constitutional violations. The court does not suggest that LRA is immune from improvement or that individual prisoners cannot bring claims against the

County for inadequate research responses in specific cases. However, the record here utterly fails to reveal legally-cognizable injuries widespread enough to warrant systematic relief. The court thus terminates the Access to the Courts Decree.

C. The Amended Disciplinary Procedures Decree

In *Wolff*, 418 U.S. at 564-66, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment entitles certain inmates facing disciplinary charges (1) twenty-four hour advance written notice of the hearing and the claimed violation, (2) the opportunity to call witnesses and present evidence, if doing so would "not be unduly hazardous to institutional safety or correctional goals," and (3) "a written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken." However, the Court declined to require prison officials to permit inmates to cross-examine witnesses. *Id*. at 567-68. In addition, the Court held that inmates did not have the right to counsel, but might seek the assistance of a fellow prisoner or staff member under special circumstances. *Id*. at 570. Subsequent cases have made clear that these protections apply to (1) all pretrial detainees, *see Mitchell v. Dupnik*, 75 F.3d 517, 524 (9th Cir. 1996) and (2) convicted prisoners whose potential punishments constitute "atypical, significant deprivation." *Sandin v. Conner*, 515 U.S. 472, 486 (1995).

1. Whether the PLRA Mandates Termination of the Amended Disciplinary Procedures Decree

a. Whether the Amended Disciplinary Procedures Decree Qualifies for Termination Under § 3626(b)(2)

The parties agree that the Amended Disciplinary Procedures Decree "qualifies for termination" under § 3626(b)(2). *See* Opp. Mot. Term. Consent Decrees at 44:21-22 ("aspects of the order . . . marginally exceed constitutional minimums"). The decree permits inmates "to confront and cross-examine any witnesses present at the hearing." Schmid Decl. Ex. D at 7. Because "[c]onfrontation and cross examination are not generally required and are left to the sound discretion of the prison official," *Zimmerlee v. Keeney*, 831 F.2d 183, 187 (9th Cir. 1987), the decree is overbroad. In addition, the decree requires one member of the panel to be an attorney. However, panels may lawfully consist entirely of prison staff. *See Wolff*, 418 U.S. at 570-71; Opp. Mot. Term. Consent Decrees at 45 n.66 ("it is clear that the provisions of the [amended disciplinary procedures decree] requiring attorney members o[n] the hearing panels exceed the constitutional minimum").

b. Whether Portions of the Amended Disciplinary Procedures Decree Remain Necessary to Correct Ongoing Constitutional Violations

Prisoners' opposition to the County's motion to terminate the Access to the Courts Decree featured detailed declarations from seven prisoners about LRA's flaws. However, only Golden, Walker, and Bautista claim to have suffered due process violations. The majority of the prisoners' opposition with respect to the Amended Disciplinary Procedures Decree concerns alleged injuries to other members of the inmate population. As a threshold matter, the County argues that "[p]laintiffs cannot carry their burden by pointing to injury by some unidentified member of the class." Rep. Supp. Mot. Term. Consent Decrees at 17:21-23.

The County's argument is not persuasive. It is true that "'named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Lewis*, 518 U.S. at 357 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 40 n. 20 (1976)). But the current motion is one to terminate a consent decree. The parties merely stipulated to let seven prisoners offer evidence. The court is aware of no authority that suggests that a court cannot consider evidence of injuries suffered by the inmate population at large when ruling on a motion to terminate a consent decree. Indeed, courts may order—or refuse to terminate—prospective relief based upon a single inmate's proof of a pervasive or intractable problem. *See Ashker v. California Dept. of Corrections*, 350 F.3d 917, 924 (9th Cir. 2003) (affirming district court's order granting single plaintiff's motion for an injunction under the PLRA against prison's policy requiring books to contain a stamp from an approved vendor). It is § 3626(b)(3)'s needs-narrowness-intrusiveness requirement, and not a *per se* rule of evidence, that ensures that the "court's exercise of equitable discretion . . . heel[s] close to the identified violation." *Gilmore*, 220 F.3d at 1005.

The County insists that "[w]ithout actual injury[, prisoners] cannot seek relief on behalf of him or herself or any member of the class." Rep. Supp. Mot. Terminate Consent Decrees at 26:6-11. However, unlike the right to court access, it is well-established that there is no "actual injury" requirement for procedural due process violations:

> Even if respondents' suspensions were justified, *and even if they did not suffer any other actual injury*, the fact remains that they were deprived of their right to procedural due process . . . . Common-law courts traditionally have vindicated deprivations of certain

> 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.

Carey v. Piphus, 435 U.S. 247, 266 (1978) (emphasis added). "*Lewis* simply requires that in order to show actual injury prisoners must identify an actual right that has been violated." *Armstrong v. Davis*, 275 F.3d 849, 865 (9th Cir. 2001). No actual right has been violated unless a law library's inadequacies cause a certain kind of harm. Conversely, being denied adequate process is legally-cognizable harm itself. Thus, the mere fact that prisoners offer no evidence of a further injury flowing from the alleged constitutional deprivation does not doom their due process claims.[37]

i. Whether the County Fails to Provide Twenty-Four Hour Written Notice of the Hearing and Claimed Violation

The Amended Disciplinary Procedures Decree requires supervisors to "inform the prisoner of the alleged violation, together with a copy of the violation, and inform the prisoner of his/her right to a hearing." Schmid Decl. Ex. D at 3-4. Jail staff must then set a hearing date "not more than five judicial days from the date of the written notice of the violation, and not more than ten judicial days from the discovery of the violation." *Id*. at 4-5.

Prisoners make two factual arguments in support of their claim that the County does not comply with the written twenty-four hour notice requirement. First, they assert that the County produced infraction notices from Elmwood in discovery. On 167 such notices, jail personnel failed to check a box that states

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[37] The County argues that *Mitchell*, 75 F.3d at 517 holds otherwise. In that case, Shabazz, an inmate, sued under 42 U.S.C. § 1983, claiming that Robare, a correctional officer, failed to tape record a disciplinary hearing. According to Shabazz, Robare's wrongdoing "resulted in his unjustified assignment to nineteen days of segregation." *Id*. at 520. The district court granted Shabazz's summary judgment motion and awarded him $1,000. The Ninth Circuit reversed. The court reasoned that Shabazz had failed to link Robare's conduct to the specific harm at issue. *Id*. at 526. However, contrary to the County's contention, *Mitchell* does not hold that no constitutional violation occurred. Instead, *Mitchell* holds that the constitutional violation could not have caused the harm for which the court intended the damage award to compensate. *See id*. ("we conclude that the district court erred in finding a sufficient showing of causation"). Thus, *Mitchell* does not mandate an "actual injury" requirement for due process claims.

"copy of explanation of charges to prisoner." Hua Decl. Ex. 1.[38] Nevertheless, the probative value of officers' failure to check a tiny box on a complex form is limited. As the County explains, this form contains a second page that pertains directly to the interaction between the sergeant and the inmate. This page contains a box in which the sergeant must log the time and date when the "[i]nmate [is] first given [a] copy of [the] infraction." Fischer Decl. Ex. D. Both the inmate and the sergeant must sign the form. After reviewing these forms, the court concludes that prisoners' assertion is unpersuasive. For one, a large percentage of these "unchecked box" forms actually involve prisoners who *admit* the alleged infraction. *See, e.g.*, Hua Decl. Ex. 1 at Bates Nos. C4527; C4554; C4556; C4458; C4560; C4562; C4564; C4566; C4568; C4757; C4794; C4601; C4608; C4614; C4802; C4863; C4869; C4875; C4878; C4914-16; C4931; C4947-50. Because these prisoners never receive a hearing, advance written notice is irrelevant. Moreover, several other forms relate to prisoners who expressly waived their right to twenty-four hour notice. *See, e.g.*, *id*. at C4570; C4829; C4963. In addition, prisoners exaggerate the number of "unchecked box" forms by counting several forms stemming from a single incident as distinct examples of lack of written notice. *See, e.g., id*. at Bates Nos. C4947-50 (pertaining to one infraction). Finally, the overwhelming majority of forms with an unchecked box on the first page contain the inmate's signature attesting to the fact that he received twenty-four hour written notice on the second page. The second page is more likely to be accurate than the "unchecked box": presumably, any inmate who did not receive written notice could refuse to endorse the sergeant's assertion that he did. Therefore, the court rejects this aspect of prisoners' argument.

Second, prisoners contend that Hernandez, Officer Joan Conner, ("Conner") and Lieutenant Kristine-Marie Irene Pantiga ("Pantiga"), have "admitted that some inmates have not been provided with written notice of . . . charges." Opp. Mot. Term. Consent Decree at 39:17-23. Hernandez testified that he remembered an incident where an inmate "wasn't even aware of the infraction until the sergeant went to see him" and did not receive a copy of the charges before the hearing. Hernandez Depo. at 123:9-23. However, although Conner acknowledged that she did know of instances where inmates "have not received their copy" of the infraction, she also asserted that "the infraction is dismissed" and "[t]he process stops right

[38] The County moves to strike Hua's declaration under Federal Rule of Civil Procedure 37(c)(1), arguing that prisoners did not disclose Hua as an expert or lay witness. The court declines to do so because it has denied the prisoners' motion to strike Fischer's declaration on similar grounds.

there." Conner Depo. at 29:9-19.[39] Similarly, Pantiga testified only that she knew of a *few* inmates who *claimed* that they did not receive written advance notice:

> Q. Do you know of any occurrences where inmates have not received a copy of their infraction notices at Elmwood?
> A. Do I—I know of cases where an inmate states that he did not receive it.
> Q. Okay. And do you know of such occurrences when an inmate states they didn't receive their copy?
> ***
> A. Yes.
> ***
> Q. Okay. And how many times does that occur at Elmwood?
> ***
> A. Based on what the paperwork I've reviewed and that would include grievances and the hearings, it doesn't occur that often.
> ***
> Q. You'd say it's less than 10 times that an inmate's complained that they have not received a copy of their infraction[?]
> ***
> A. It's less than five times that I've been made aware of.

Pantiga Depo. at 84:10-85:14. Thus, even interpreted in the light most favorable to prisoners, the evidence shows that the County is largely complying with *Wolff*'s twenty-four hour written notice requirement. The court declines to modify the Amended Disciplinary Procedures Decree in this respect. Because of the paucity of evidence of constitutional violations, any amendment would just reiterate *Wolff*'s rule. As prisoners themselves observe, the County must already meet this standard. *See* Opp. Mot. Term. Consent Decrees at 32:23-25 ("orders stating simply 'obey the Constitution' . . . would, of course, be redundant, since government officials are already bound to do so").

ii. Whether the County Fails to Inform Prisoners of Their Right to Call Witnesses and Present Evidence

The Amended Disciplinary Procedures Decree states that prisoners (1) "shall be entitled to confront and cross-examine any witnesses present at the hearing" and (2) "shall have the right to present relevant evidence on his/her behalf, at no expense to the County." Schmid Decl. Ex. D at 6. Although the decree thus does not expressly give prisoners the right to call witnesses, arguably this right is implicit in the decree's

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[39] Although there is no "actual injury" requirement for a due process violation, an inmate who does not attend a hearing for which he received defective notice fails to prove that any "process was due" and thus has no procedural due process claim. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'") (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951)).

acknowledgment that witnesses may be "present" and its broad statement that inmates may "present relevant evidence."

Wolff opined that "it would be useful for [a disciplinary panel] to state its reason for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases." *Wolff*, 418 U.S. at 566. However, the Court refused to makes this comment a rule of constitutional law. *Id*. In *Bartholomew v. Watson*, 665 F.2d 915, 917 (9th Cir. 1982), the Ninth Circuit invalidated a policy that forbade inmates from calling other inmates or staff members who worked within the prison as witnesses. The court reasoned that "a blanket proscription against the calling of certain types of witnesses in all cases involving institutional security is an overreaction which violates minimal due process." *Id*. at 918. In addition, the court determined that the policy "violates the suggestion of the Supreme Court in *Wolff* that the decision to preclude the calling of a witness should be made on a case-by-case analysis of the potential hazards which may flow from the calling of a particular person." *Id*.

Several years after *Wolff*, in *Mitchell*, 75 F.3d at 525, the Ninth Circuit held that a jail violated an inmate's due process rights when its stated policy permitted inmates to call witnesses during disciplinary hearings, but it never actually allowed them to do so. Although the court noted that *Wolff* requires neither that (1) "jail officials . . . afford inmates an unrestricted right to call witnesses" nor that (2) "officials . . . state their reasons for refusing to call a witness," it held that prison officials improperly refused to "evaluate inmate requests to call witnesses on a case-by-case basis." *Id*.

Prisoners assert that jail personnel often (1) fail to inform inmates that they may call witnesses, (2) deny inmates' requests to call witnesses, and (3) do not provide reasons for denials. Prisoners again rely on deposition testimony from Hernandez, Pantiga, and Conner.[40] Hernandez explained that officers sometimes

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[40] Walker alleges that the DOC did not allow him to present witnesses at his infraction hearings "[o]n numerous occasions." Walker Decl. ¶ 35. However, Walker does not provide enough detail for the court to determine whether the panel denied his requests arbitrarily or due to security reasons. The County notes that Walker "is double-red who is in special housing." Rep. Mot. Term. Consent Decrees at 23:9-10 (citing Walker Depo. at 15:11-12). Prisoners move to strike this statement on the grounds that it is substantially more prejudicial than probative under Federal Rule of Evidence 403. The court denies the motion. Walker's security status is highly probative of the issue of whether the County can properly forbid him from calling witnesses.

Bautista claims that, when he received an infraction in 2004, the panel did not advise him of his right to call witnesses or get a continuation if witnesses are unavailable. Bautista Decl. ¶ 37. Bautista contends that he was found guilty, but successfully appealed because, *inter alia*, because the panel did not advise him of his right to witnesses. *Id*. at ¶¶ 41-42. Although Bautista's allegation may state a procedural due

refuse to let inmates call witnesses, often citing safety concerns, but sometimes giving no reason at all. *See* Hernandez Depo. at 125:14-25. But despite prisoners' protestations, this is not objectionable: no case holds that prison officials must explain why they are declining an inmate's request to call witnesses. *See Mitchell*, 75 F.3d at 725 ("*Wolff* does not require jail officials . . . to state their reasons for refusing to call a witness, although the Court would deem such notice useful"). In addition, the bulk of Hernandez's testimony describes a system that, although imperfect, functions adequately:

> Q. Are you aware of any hearing that you attended where a witness that the inmate wanted to call didn't testify?
> A. No.
> ***
> [However,] in particular at Elmwood at times, I go and speak to the witness that the inmate might have. When we go to the panel. I'm asked if I spoke to the witness. I said, Yes. And then they go, Okay. They tell the panel to take that into account. And the witness is not brought forth.
> ***
> Q. [Y]ou tell the panel members that "We want to present this witness, but"—and they say, No you can't. You say; Okay, that's fine?
> A. No. Like last week, we argued the point. They brought the witness.

Hernandez Depo. at 125:15-130:8.

Likewise, prisoners cite Pantiga's deposition for the proposition that "DOC confirmed that there were several instances at both [the] Main Jail and Elmwood . . . where inmates were refused the opportunity to call witnesses." Opp. Mot. Term. Consent Decrees at 37:24-26. The County contends—and the court agrees—that this misrepresents Pantiga's testimony. Pantiga actually explained that every refusal was justified:

> Q. Do you know of any occasions where an inmate was refused the opportunity to call witnesses?
> A. Yes.
> Q. And how many times did that occur?
> A. At Elmwood I can think of one time at least that that's occurred.
> Q. Okay. And at the Main Jail?
> A. Going back many years, but I would say —I would say at least ten times. And then the Main Jail specifically the witnesses *it was because of the dynamics of the facility and the security level of the inmates*. So if the advocate would come and tell us that they wanted a witness we'd say can you interview the witness and speak for the witness on the witness' behalf? Because it's a big security issue for us to bring some of those level 4s together for a hearing so that does occur. *At Elmwood I believe the time I'm thinking of, the inmate didn't tell us he wanted a witness until he got there*.

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process claim, it also suggests that the County is aware that it cannot punish prisoners unless it follows *Wolff*.

Pantiga Depo. at 180:4-24 (emphasis added).[41] Thus, although it appears that the County refuses to let inmates call witnesses, the lion's share of such decisions stem from safety concerns. Unlike the improper blanket exclusionary policies in *Bartholomew* or *Mitchell*, the County does not completely forbid inmates from calling witnesses. The evidence does not warrant a continued injunction.

iii. Whether the Panel Fails to Give Prisoners a Written Explanation of the Decision and the Evidence Upon Which It Relied

The Amended Disciplinary Procedures Decree requires the panel to "indicate in writing its decision and the facts [on which it] relied." Schmid Decl. Ex. D at 6. According to the prisoners, seventy-five percent of decisions contain no rationale. Hua Decl. ¶ 5. The County contends that prisoners "selectively chose disciplinary documents to copy" and that "[i]t is not clear that they copied all disciplinary actions." Schmid Reply Decl. ¶ 26. However, prisoners assert that they "did not select disciplinary hearing records for copying" and believe that they reviewed these documents "'en masse.'" Kaushik Decl. Supp. Sur-Reply Mot. Term. Consent Decrees ¶ 15. Prisoners did not submit these documents to the court, but indicated their willingness to do so. *See* Hua Decl. ¶ 2 n.1.

To resolve this issue, the court orders the parties to meet and confer by December 2, 2005. Prisoners must make accessible to the County the records from which they derived their seventy-five percent figure. The County shall inform the court if it believes that prisoners' estimate is inaccurate or pertains to individuals who do not fall within the two classes entitled to *Wolff* protection. Otherwise, prisoners have established a "current and ongoing" constitutional violation widespread enough to warrant systematic relief. The parties shall then have until December 16, 2005 to propose a decree concerning disciplinary procedures, if any, that should remain in effect. Any proposed continuing decree should be limited only to the issue of a prisoner's rights to receive a written decision of a disciplinary panel determination.[42] The court understands that it may properly order relief that exceeds the constitutional

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[41] Prisoners also argue that the County improperly denies an inmate's request to call witnesses based on the panel's unilateral determination that the witness is not relevant. Opp. Mot. Term. Consent Decrees at 38:15-19. However, Conner testified that the panel makes relevance decisions after "conferring with the inmate" and assessing "security" and "accessib[ility]" concerns. Conner Depo. at 104:3-022.

[42] Prisoners also argue that (1) panel members are not properly trained, (2) lay advocates provide poor service, and that inmates are not entitled to (3) cross-examine witnesses or (4) receive a self-incrimination warning. *See* Opp. Mot. Term. Consent Decrees at 39:24-42:13. Because these issues are

floor; however, prisoners must be mindful of the fact that any such relief must also pass the needs-narrowness-intrusiveness requirement. In addition, the court would like the parties to discuss an appropriate remedy for the County's prior contempt for implementing a change to the Access to the Courts Decree without court approval.

III. ORDER

For the foregoing reasons, the court:

1. Terminates the Access to the Courts Decree;

2. Terminates the Amended Disciplinary Procedures Decree in its entirety except to the extent that it entitles inmates to a written statement of the evidence upon which the panel relied;

3. Orders the parties to meet and confer as described herein.

DATED: 11/15/05

/s/ Ronald M. Whyte

RONALD M. WHYTE
United States District Judge

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neither compelled by the Constitution nor within the scope of the Decree, the court declines to consider them. Prisoners' proposed amendment should also not include these issues. However, prisoners are free to seek class certification and move for an injunction under 18 U.S.C. § 3626(a) on these issues.

Notice of this document has been mailed to:

Counsel for Plaintiff(s):

James McManis
William Faulkner
McManis Faulkner & Morgan
50 West San Fernando St., 10th Floor
San Jose, CA 95113

James Zahradka
Kyra Kazantzsis
Public Interest Law Firm
Law Foundation of Silicon Valley
111 West Saint John Street, Suite 315
San Jose, CA 95113

Counsel for Defendant(s):

Ann Miller Ravel
Steve Schmid
Aryn P. Harris
Office of the County Counsel
70 West Hedding St., East Wing, Ninth Floor
San Jose, CA 95110

Dated: 11/15/05

DOH
Chambers of Judge Whyte